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On Prometheus' Legacy: H. Patrick Glenn's Pluralist Logics, Enzo Melandri's Analogy, and Legal Plurality's 'Ontological Register'

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Abstract: Over the past few years, legal theorists and socio-legal scholars have increasingly been advocating the formation of a pluralist jurisprudence capable of efficiently identifying and operationalising current regulative phenomena beyond and within state-based constructs. The cosmopolitan rethinking of legal thought centred on the emergence of non-classical, paraconsistent logics promoted by the late leading comparatist H. Patrick Glenn has become a key-theme of these new meta-theoretical reflections. Starting from this premise, this article explores Glenn's call for logical pluralism in (comparative) legal studies through the lens of the Italian philosopher Enzo Melandri's reflections on what distinguishes the rationality of classical and paraconsistent logics from that of analogical reasoning. The aim is to show that a contextualisation of Glenn's thought from the perspective of Melandri's philosophy confirms how because of their inner rationality and cognitivist purpose, neither classical nor paraconsistent logics can act as a gateway to legal plurality's facticity. Instead, as plurality is a matter of factical experience rather than reason and knowledge (and thus, analytical reconstructions), what is required is a factical, experiential thinking capable of accommodating the facticity of otherness as (cultural) diversity and alterity in the legal dimension.

Keywords: H. Patrick Glenn; Enzo Melandri; logic; plurality; experiential thinking

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Logical abstraction is also sociological abstraction[1]

Once an experience has become measurable and certain, it immediately loses its authority[2]

[M]eaning is not a conceptually or inferentially structured "logical space"

that can only be rationally reconstructed[3]

INTRODUCTION

Over the past few years, legal theorists and socio-legal scholars have increasingly been advocating the formation of a pluralist jurisprudence capable of efficiently identifying and operationalising current regulative phenomena beyond and within state-based constructs. While this pluralist wave takes different forms,[4] a key-theme of these new meta-theoretical reflections is the cosmopolitan rethinking of legal thought centred on the emergence of non-classical, paraconsistent logics advocated by the leading comparatist H. Patrick Glenn.[5] Simply put, the term 'paraconsistent logic' refers to a ternary form of multivalent and modal logical thought that accommodates contradictions. This is done by transcending the binary code (i.e. 'either A or ¬A') upon which the Western tradition has emerged and developed to date. Instead of forcing the interpreter to choose between 'A' and '¬A' (i.e. 'B') according to the laws of

[1] Herbert Marcuse, *One-Dimensional Man*: *Studies in the Ideology of Advanced Industrial Society* ([1964] 2002), p. 143.
[2] Giorgio Agamben, "An Essay on the Destruction of Experience" in *Infancy and History*, trans. Liz Heron ([1978] 2007), p. 20.
[3] Steven Crowell, *Normativity and Phenomenology in Husserl and Heidegger* (2013), p. 30.
[4] Nicole Roughan and Andrew Halpin, "The Promises and Pursuits of Pluralist Jurisprudence", in Nicole Roughan and Andrew Halpin (eds.), *In Pursuit of Pluralist Jurisprudence* (2017), p. 326.
[5] See Maksymilian Del Mar, "Legal Reasoning in Pluralist Jurisprudence: the Practice of the Relational Imagination" in Roughan and Halpin, note 4 above, p. 40.

non-contradiction and the excluded middle,[6] paraconsistent logics make room for various *tertia comparationis* that under the exclusionary razor of binary thinking would not find accommodation. There is, in other words, a 'C' – that is, a third (and, thus, multiple) way(s) to coherently and validly reason which, depending on the context of reference, allows us to hold views that what would otherwise be deemed illogical, or logically impossible. The thinking and use of such 'tolerant' logics, Glenn maintained, is simply inevitable if we are to appreciate legal traditions' and legal orders' inner pluralist dynamics and structural interactions in an age, such as ours, characterised by increasing regulatory density, complexity, and uncertainty.

Unsurprisingly, Glenn's call for logical pluralism in (comparative) legal studies has generated a considerable amount of interest. This articles aims to contribute to the academic debate on the subject by offering a never-attempted contextualisation of Glenn's thought from the perspective of the Italian philosopher Enzo Melandri's reflections on what distinguishes the rationality of logical thinking (including its pluralist variants) from that of its analogical counterpart. It shows that a contextualisation of Glenn's views through the lens of Melandri's philosophy confirms how because of their inner rationality and cognitivist purpose, neither classical nor paraconsistent logics can act as a gateway to legal plurality's facticity. More specifically, I argue: (A) that underpinning Glenn's argument there lies a *philosophical* interrogative regarding the nature and meaning of plurality and their appreciation; (A1) that this interrogative concerns what Andrew Benjamin has described as the ontological irreducibility of plurality, that is, its original, relational alterity and how the latter is phenomenologically encountered; (B) that the ternary forms of logical pluralism envisaged by Glenn are ultimately unable to accommodate plurality within juridical discourse and thus, assisting pluralist jurisprudence's cause; (C) that this applies to analogical reasoning as well; because (D), as is the case with classical logic, the operativity of pluralist logics and analogical approaches to phenomena is dependent upon reason's metaphysical constructivism and knowledge's transcendentalism as originating from the Promethean myth; (E) that appreciating the facticity of plurality, including legal plurality, requires moving beyond Husserlian and Heideggerian phenomenology and (E1) embarking upon an other-regarding and meaning-revealing act of lived experience (i.e. experience as *Erlebnis*, freed from epistemic ambitions and as opposed to *Erfahrung* and knowledge) capable of letting regulatory dynamics appear as

[6] But see Priest Graham, Koji Tanaka, and Zach Weber, "Paraconsistent Logics", in *Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/logic-paraconsistent/ (accessed 19 June 2019), who specify that "many paraconsistent logics do validate the Law of Non-Contradiction…, $\vDash\neg(A\wedge\neg A)$, even though they invalidate [the argument *ex contradictione quodlibet* that $A, \neg A \vDash B$]".

relational *encounters*. These claims are substantiated through a contextualisation of the role that the 'experience-knowledge' dichotomy as well as logic, analogy, and conceptual thinking play within legal discourse, including comparative legal studies.

As will be seen, since its inception, Western philosophical thinking has never stopped concerning itself with the causes of the existence of the manifold and the related issue of the orderability of particulars (to which philosophers oppose universals or similar constructs, such as concepts).[7] The possibility, trajectories, and outcomes of these sorts of inquiries depend on our ability to make sense of the world. This is why meaning exerts a normative, guiding function. The normative role played by the ontological notions of 'identity' and 'difference' (that is, *what it means* for someone/something to be her/itself and therefore, not someone/something else) – both of which, not coincidentally, feature at the centre of Glenn's work – has been a key-theme of this type of questioning on what constitutes (that is, on how we can make sense of) the real. Things have not changed to date: "the *making sense* relation is the basic normative relation",[8] as David Owens recently observed using terminology that directly emphasises the performative role that 'meaning' plays in the normative encounter between subject and object. Drawing from the philosophy of Edmund Husserl and Martin Heidegger, Steven Crowell has stressed the inherently phenomenological character of the normative, ordering process: "phenomenology… break[s] decisively with mentalism and representationalism and explore[s] meaning as encountered directly in our practical and perceptual life".[9] In other words, being a *practice*,[10] phenomenological inquiry aims to reach the 'whatness' of beings by focusing on their 'howness' *as* phenomena, i.e. as relational encounters between subject and object. In so doing, phenomenology shows that the 'whatness' interrogative is structurally related to how "something *as* something"[11] reveals itself.[12] Phenomenology, then, challenges the metaphysical tradition of subjectivism and holds that whichever meaning is generated through the relational encounter is not the result of some

[7] In 1935, more than two millennia after the spring of philosophy, Martin Heidegger commenced his lecture course on metaphysics at the University of Freiburg by asking "Why are there beings at all instead of nothing?". In *Introduction to Metaphysics*, trans. and ed. Gregory Fried and Richard Polt ([1957] 2014), p. 1. See also Etiénne Gilson, *The Unity of Philosophical Experience. The Medieval Experiment, the Cartesian Experiment, the Modern Experiment* ([1934] 1967), ch 12.
[8] David Owens, *Shaping the Normative Landscape* (2012), p. 12. Emphasis added.
[9] Crowell, note 3 above, p. 34.
[10] Roberta De Monticelli, *Il Dono dei Vincoli. Per Leggere Husserl* (2018) 7. All translations are mine.
[11] Crowell, note 3 above, p. 16. Emphasis in original.
[12] Ibid., p. 19.

individual positing. Rather, it is the result of what could not have been otherwise – hence meaning's guiding-role in life, or normativity.

The normative properties that characterise the phenomenological process' relational dynamics exert their guiding function not only when we encounter an object (such as a pen, a car, a tree, a legal norm, or even an argument[13]), but also when we encounter another subject (that is, a person). This is why the relationally-charged phenomenological reading of plurality has been recently placed at the centre of philosophical evaluations of social and political coexistence as well.[14] If that is the case, it can be safely argued that *legal* plurality too is governed by the same relational, phenomenological dynamism as it too is an expression of the *relational phenomenon* that is plurality.[15] This simply means that, as I aim to show, legal plurality[16] also requires "a phenomenological articulation of existential issues",[17] following Sophie Loidolt.

The question, however, is *which* phenomenological route the interpreter ought to embark upon given the variety of accounts in phenomenological discourse. The answer I offer with this article is that what is needed is a phenomenological thinking that embraces plurality for what it is—i.e. a matter of factical experience, rather than knowledge and reason. As already mentioned and will be further set out in due course, this means departing from both Husserlian and Heideggerian phenomenology. This is why the term 'ontological register' is of the essence for what follows. The term is borrowed from Andrew Benjamin's seminal work on the ontological irreducibility of plurality as original relational alterity.[18] Benjamin argues for the "necessity to think the relational"[19] from unexplored viewpoints, which allows the interpreter to appreciate its "original presence".[20] Original here means always ontologically given and irreducible: "a particular is *given*, and *always given*, within relations",[21] Benjamin writes.

[13] Reinar Forst, *Normativity and Power: Analyzing Social Orders of Justification*, trans. Ciaran Cronin ([2015] 2017), p. 74.
[14] Thomas Szanto, Dermot Moran (eds.), *Phenomenology of Sociality. Discovering the 'We'* (2015); Sophie Loidolt, *Phenomenology of Plurality. Hannah Arendt on Political Intersubjectivity* (2017).
[15] Cf. Alexander Somek, *The Legal Relation: Legal Theory after Legal Positivism* (2017), p. 20; Ugo Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems", *American Journal of Comparative Law*, XLV (1997), pp. 5, 19.
[16] My choice of the term 'legal plurality' is not causal as one of my main aims is to avoid discussing alterity via recourse to analytical elaborations, such as that of 'legal pluralism(s)'. On the latter's self-referential meanings, see Jaakko Husa, "The Truth is Out There? Legal Pluralism and the Language-Game", in Séan Patrick Donlan and Lukas Heckendorn Urscheler (eds.), *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives* (2014), p. 75.
[17] Loidolt, note 14 above, p. 20.
[18] Andrew Benjamin, *Towards a Relational Ontology: Philosophy's Other Possibility* (2015), p. 1.
[19] Ibid., p. 6.
[20] Ibid., p. 2.
[21] Ibid., p. 19. Emphases added.

Singularities can only be (and, thus, be *experienced*) as an "after-affect"[22] of the "constituting plural event".[23] In other words,

> The plural event is that which allows for singularities… [T]he term has a double ontological register. In the first instance, that register identifies the presence of a founding ontological irreducibility. Secondly and consequently, that register marks the place of a founding set-up that needs to be explicated in terms of relational ontology precisely because it is the site of already present and irreducible relations… Irreducibility is an essential part of relationality… If a relation is original, then there cannot be any element of the relation that precedes it.[24]

From this it follows that "[p]lurality's originality can no longer be thought in terms of a *reductio ad unam*".[25] Thus, Benjamin's mode of experiencing reality as irreducible relational alterity deactivates the very ontological impasse that characterises the Western tradition's approach to what distinguishes the universal from the particular.[26] This theme is of pivotal importance for my argument as it is directly related to how identities and differences are experienced (i.e. *how* the meaning of *what* they are is phenomenologically generated). More specifically, its relevance for the scope of this article is due to the fact that it makes room for a form of phenomenological, relational thinking capable of overcoming the inconsistency of the two opposing views that philosophy has divided itself into since its inception: that which decodes reality through processes of individualisation, and that which sees it as an "abstract universality".[27] What has gone missing in all of this is that plurality does not have an "essential nature".[28] Hence "the relationship between universal and particular is not the way original relationality is to be understood".[29] Rather, "[r]elationality describes a state of affairs that is ontological. It is not just that being is relational but that what exists fundamentally is a relation".[30] Asserting that relationality has no essence simply means holding that "[w]hile relationality is ubiquitous, there is no one determined form of relationality. On the contrary, singulars are always already in relation such that singularities are the after-effect of

[22] Ibid., p. 2.
[23] Ibid.
[24] Ibid., p. 3.
[25] Ibid., p. 4.
[26] Ibid., p. 11.
[27] Ibid., p. 16.
[28] Ibid.
[29] Ibid.
[30] Ibid.

relationality".[31] Accordingly, "[s]ingularites, and thus particulars, do not have an abstract quality such that all singulars are defined in terms of an excluding and exclusive form of abstraction…".[32]

Starting from this premise – and sharing Andrei Marmor's argument on the need for more *philosophical* investigations into law's ontological status[33] – the following pages show that for jurisprudence to be fully pluralist, it needs to abandon the epistemic search for truth and correctness[34] that has kept it increasingly busy since Rome's revolutionary ontological abstraction of phenomena and predominantly throughout modernity. Rather, jurisprudence will have to concern itself with the ontological irreducibility of factical existence's *meaningful* relationality. This is all the more relevant if we think of law as a series of shared normative experiences.[35] To say that jurisprudence has to be sensitive to context – an argument that has been increasingly made since William Twining's landmark work on the subject[36] – is certainly an important part of this pluralist effort. Yet this is not enough: as anticipated above, appreciating (legal) plurality's facticity ultimately requires embarking upon an other-regarding and meaning-revealing act of lived experience (*Erlebnis*) capable of letting regulatory dynamics appear as relational *encounters*. Neither reason's metaphysical constructivism (as epitomised by logical and analogical thinking, and conceptual representationalism), nor knowledge (i.e. a metaphysical end-result of processes of ontological abstraction[37]) can be of assistance in this effort. As the Promethean myth reveals, reason's and knowledge's immanent and transcendental character embraces reality only to overcome it. Rather, appreciating the relational nature and meaning of identity and the alterity that defines it requires experiencing the facticity of the other *as other* (i.e. what it *phenomenologically means* for the other to actualise themselves in their ipseity). As plurality is a matter of factical experience rather than

[31] Ibid., p. 17.
[32] Ibid.
[33] Andrei Marmor, "What's Left of General Jurisprudence: On Law's Ontology and Content", *Jurisprudence*, X (2019), p. 151.
[34] Some comparative lawyers are aware of this: see Mark van Hoecke "Is There Now a Comparative Law Scholarship?", *The Journal of Comparative Law*, XII (2017), p. 271.
[35] Emmanuel Melissaris, *Ubiquitous Law. Legal Theory and the Space for Legal Pluralism* ([2009] 2016); Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (2018), pp. 35, 37–38.
[36] William Twining, *General Jurisprudence. Understanding Law from a Global Perspective* (2009). Recently, in the comparative law literature, see Jaakko Husa, *Advanced Introduction to Law and Globalisation* (2018), p. 46; Catherine Valcke, *Comparing Law. Comparative Law as Reconstruction of Collective Commitments* (2018), p. 97.
[37] Due to restrictions on space, I do not directly discuss the act of 'cognition', by which term I mean the act of acquiring information/knowledge. I will only make some indirect considerations to the extent that this is required for the purposes of my argument.

reason and knowledge (and thus, analytical reconstructions), factical thinking is the gateway to pluralist thinking not only in general, but also within (comparative) legal discourse.

This article is divided as follows. Section I sets out the basic thrust of Glenn's argument on cosmopolitan thought and logical pluralism. Section II discusses the aspects of Melandri's complex philosophy on logic, including its non-classical variants, and analogical thinking, which are more relevant from the perspective of Glenn's account. Taking one step further, Section III engages with some central and pervasive themes regarding logical and analogical thought and conceptual analysis in Western jurisprudence as well as theoretical inquiries in pluralist settings more broadly. It then (briefly) explores an experiential thinking capable of accommodating the facticity of otherness as (cultural) diversity and alterity in the legal dimension. Concluding remarks follow.

GLENN'S COSMOPOLITAN THOUGHT

What is a Tradition?

H. Patrick Glenn was a leading legal international comparatist whose seminal works have played (and will no doubt continue to play) a fundamental role in shaping the development of the theory and practice of comparative law. The success of Glenn's scholarship (and lectures) is not just due to the analytical depth of his reflections regarding such topics as the aims of comparative law and the origins and development of legal traditions. Another important reason for Glenn's peculiar appeal is the combination of his inter-disciplinary methodology of inquiry and elegant writing style. *Legal Traditions of the World*,[38] arguably Glenn's most important work,[39] was deemed important enough for the inaugural issue of *The Journal of Comparative Law* to be dedicated to it. Glenn has also attracted a considerable amount of criticism, most notably from such cultural and critical comparative scholars as James Whitman and Pierre Legrand.[40] The lively debate that Glenn's claims and methodology of inquiry have generated

[38] H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (2010). Hereinafter 'LTW'.
[39] Defined as "path-breaking" by David Nelken, in "Review: The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century, by Esin Örücü", *Legal Studies*, XXVI (2006), p. 129.
[40] See for instance, James Whitman, "A Simple Story",*Rechtsgeschichte*, IV (2004), p. 206; Pierre Legrand, "Jameses at Play. A Tractation on the Comparisons of Laws", *American Journal of Comparative Law*, LXV (2017), pp. 1, 14–15.

over more than two decades is testament to how influential his work has become within the comparative law circle and beyond.[41]

It is in LTW's last chapter that Glenn sets out the need for a form of logical thinking capable of appreciating legal traditions' internal and external plurality. For Glenn, a tradition is an entity composed of information.[42] Better still, tradition *is* information. Before moving on to explain what sort of information a tradition exactly is, drawing from J.A.G. Pocock, Glenn clarifies that "it would be inappropriate to see it… as an indefinite series of repetitions of an action".[43] This would lead us to erroneously confuse "the results or impact of the tradition, its immediate manifestation, with the tradition itself".[44] This is because "[i]f there is a 'traditional way of doing things', the tradition is the way, and not in the doing. Acts or decisions, once they take place, disappear forever if they are not translated into *communicable* information".[45] This passage will prove to be fundamental for our purposes as it specifically points to the two themes that Glenn's pluralist argument is grounded on: identity and communication. These are discussed separately below.

Identity

The first theme is ontological and concerns the notion of identity[46] – a term which, alongside that of difference, has defined the very establishment and development of comparative law as a discipline. The emphasis I placed on the copula 'is' when mentioning, in the previous Section, that to Glenn a tradition is information serves to stress the importance of this theme in Glenn's cosmopolitan thinking. Importantly, the notion of identity here refers to both a tradition's identity as information and the social and individual identities traditions construct via external information exchange processes and internal pluralist dynamics.

[41] A good example is Glenn's reflections on pluralist thinking and logic, which led to the organisation of an inter-disciplinary workshop on the subject as well as to the publication of an edited collection of essays. See H. Patrick Glenn and Lionel D. Smith (eds.), *Law and the New Logics* (2017).
[42] Glenn, note 38 above, pp. 13–14.
[43] Ibid. Footnote omitted. See also H. Patrick Glenn, "Legal Cultures and Legal Traditions" in Mark van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (2007), pp. 7, 12: "Tradition may influence what we do, but it is that which precedes our actions, as a means of normative influence".
[44] Ibid., p. 13.
[45] Ibid., pp. 13–14. Emphasis added.
[46] Ibid., pp. 13, 25, and 373.

Regarding the former aspect, it is worth noticing that to Glenn, the term 'tradition' is different from that of 'system'. This emerges when, in the preface to the first edition of LTW, Glenn observes that "tradition… does not appear to be the product of any particular civilization, yet appears present, explicitly or implicitly, as a formative influence in the law of all of them".[47] Legal systems are a different ontological entity whose "history… is clearly and exclusively associated with western (and derived Soviet) legal theory".[48] This passage too is particularly relevant for our purposes as it indirectly points to another key-element of Glenn's analysis – that legal systems are theoretical constructs whose foundational dynamics are structurally related to systemic and thus divisionary and binary thought.[49] Glenn writes:

> Theories are rational constructions, which must first answer to requirements of internal consistency and logic before they are tested for explanatory power in the real world. Theories, and the logic they entail, are part of the tradition of western rationalist thought.[50]

Glenn makes a similar point with respect to the concept of 'legal culture', which he describes as a European artefact.[51] Traditions escape this constructivist logic. Yet, Glenn further specifies, drawing from T.S. Eliot,[52] that this does not mean that their formation and survival does not require constitutive 'labour'. By 'labour' Glenn means a process of "additional cultural significance"[53] to the mere existence of a way of doing (or not doing) things.[54] While such acts of 'cultural significance' might take different forms, they share a common core revolving around "human support and adherence"[55] to the relative practice (such as wearing a kilt, as in Glenn's example).

This leads us to the second aspect: how traditions make up social and individual identities. Here too the focal point of Glenn's view is how, being information, a tradition's identity is inevitably determined and shaped by external exchanges and internal pluralist dynamics. Thus

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[47] Ibid., p. xxvii.
[48] Ibid.
[49] Ibid.
[50] Ibid., pp. 3–4.
[51] See Glenn, note 43 above, p. 11: "The concept of culture exists as a means of differentiation, providing a description of difference". For a critique of Glenn's view, see Jaakko Husa, "Legal Culture vs. Legal Tradition – Different Epistemologies?" *Maastricht European Private Law Institute Working Paper 2012/18*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179890 (accessed 19 June 2019).
[52] Glenn, note 38 above, pp. 4–13.
[53] Ibid., p. 5.
[54] See above, Section I.
[55] Glenn, note 38 above, p. 6.

we read: "Given any form of contact between traditions, the overall identity of each becomes non-exclusive; each contains elements of the other, which may find support in the various tendencies in the receiving tradition".[56] This begs the question as "[t]o what extent… is this feature of traditions related to collective notions such as society, culture, a legal systems or 'ourselves'?"[57] Traditions, Glenn asserts, shape social as well as individual identities through elaborating and protecting a memory: "[i]n both cases, it is memory which is constitutive of identity".[58] After having so claimed, Glenn embarks upon some meaningful considerations regarding "two widely used present criteria for social identity: race (or ethnicity) and nationality (statehood)".[59]

To discuss Glenn's views on this latter point would take us beyond the scope of this article. Rather, and without anticipating the next Section, what needs to be emphasised is that Glenn's reflections directly tie to the ontological function that the principle of identity (i.e. 'A = A') has played in the development and promotion of binary thinking in the West. The 'law of identity' is, indeed, one the three classical laws of logic. This law states that an entity is, and cannot but be, the same with itself. Thus, the principle of non-contraction, one of the cornerstones of binary thinking, presupposes the law of identity. As will be shown below, however, Glenn firmly believes that a rigid interpretation of the notion (and thus, principle) of identity is ultimately misleading because it obfuscates the elements of plurality and otherness that inevitably form any tradition and shape its development. The opening of thought to non-binary logics has the precise scope to avoid this reductionist approach to reality and allows us to appreciate that alterity always defines identity.

Communication

The second theme of Glenn's analysis is the act of communication. Throughout LTW, the reader finds multiple references to the significance "human communication"[60] has for the correct understanding of traditions' existential dynamics and transformative potential. Indeed, the mechanisms through which the information that makes up a tradition is first selected and then communicated are constitutive of a tradition's identity for the simple reason that it is

[56] Ibid., p. 35.
[57] Ibid.
[58] Ibid.
[59] Ibid., p. 37.
[60] Ibid., p. 7.

through communication that information, and thus tradition itself, is passed on to others and therefore dynamically preserved. From this it follows that every tradition is an "epistemic community".[61] As one might expect, contemporary technological advances considerably facilitate these communication processes. However, Glenn observes that it should not be thought that epistemic communities are something new, as some have claimed: "If tradition is information, and if information is the formative element in all social identities, then the adherents to traditions have always constituted epistemic communities".[62]

The main point here is that the information that constitutes a tradition is (and cannot but be) a past instance which regenerates (while also adapting) itself through acts of communication, or *traditio*.[63] A fundamental dimension of traditions' emergence, development, and death, Glenn tells us, "is found in the necessity of tradition having been continuously transmitted, in a particular social context, in order for it to be of current relevance".[64] Hence, "[*t*]*raditio* must have occurred, and between the relevant parties".[65] Thus traditions are inherently dynamic entities. This leads Glenn to consider the meaning-generating practices, or techniques, which traditions depend upon. While, as discussed, a tradition is not a theory and thus is not bound to constructivist terms and procedures, it cannot do without those "techniques of capture"[66] through which the past is seized, shaped, and transmitted to others: "Absent these… there is only the meaningless world of total recall, or oblivion".[67]

Finally, a tradition's identity and processes of information exchange meet in another zone of interaction: commensurability. "Notions of incommensurability are well known in the west and are therefore part of western, rational tradition",[68] Glenn notes. Comparatists are very much familiar with this theme. According to a leading book on the subject, comparing becomes analytically pointless if there are no similarities to be found. [69] The assumption here is that common problems require common solutions, no matter what the underlying culture is. To be

[61] Ibid., p. 43.
[62] Ibid.
[63] This also applies to the apparently paradoxically concept of 'instant traditions', such as national legal traditions. These are not only "possible", Glenn notes, but they too are "subject to verification of time": Ibid., p. 6. Again, this has to do with the necessity of the tradition's information being communicated.
[64] Ibid., pp. 12–13.
[65] Ibid., p. 13.
[66] Ibid., p. 7.
[67] Ibid.
[68] Ibid., p. 45.
[69] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, trans. Tony Weir ([1977] 1998) 40. Zweigert and Kötz's *praesumptio similitudinis* has been contested by socio-cultural and critical comparative lawyers. For a discussion, see Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (2014), pp. 53–57.

sure, the notion of incommensurability is not "an epistemologically superior position".[70] However, it has attracted a considerable amount of favour in the past. Incommensurability's success is, of course, not accidental and is directly related to the spread of views that see traditions as "static and distinct, whereas in reality they are all composed of variants and even contradictions, some of which parallel positions which exist outside the tradition and which are known within it".[71] Here lies the structural relationship between tradition, information, identity, and communication:

> What the proponents of incommensurability would ultimately have to establish is the impossibility of human communication, radical untranslatability, and this is denied by all human experience, and possibly by the very idea of being human.[72]

Thus, Glenn concludes, "[g]iven the failure of the argument of incommensurability, we are all left within communicable traditions".[73]

The Value of Logical Pluralism

Whereas the 'identity' theme of Glenn's analysis is ontological (tradition *as* identity), the 'communication' theme is epistemological (traditions *as* epistemic communities). That Glenn is correct in approaching the communication element epistemologically emerges when we explore it from a purely Platonic point of view – a move which Glenn would have presumably agreed with given the role he assigned to Plato's thought in his considerations. In particular, what we should pay attention to is that to Plato, knowledge is, as Gail Fine has shown against others, "justified true belief [plus] *aitias logismos*"[74] – that is, "explanation".[75] This simply means – crucially – that for Plato, we only have the *logos* that is required to have knowledge if we "have the ability to say, when asked, how x *differs* from other things".[76] To identify something, to know what it is (ontology), we need to able to explain – to communicate

[70] Glenn, note 38 above, p. 47.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Gail Fine, "Introduction" in *Plato on Knowledge and Forms: Selected Essays* (2008), p. 5. Emphasis in original.
[75] Ibid., p. 116. See also ibid., p. 93.
[76] Ibid., p. 26. Emphases omitted. See also ibid., p. 226: "Knowledge of things, for Plato, is description-dependent". For a detailed discussion of the relationship between knowledge of forms (ideas) and knowledge of material things (sensibles), see ibid., pp. 8–15, and chs 3 and 4.

(epistemology) – why it is different from what it is not. It is thus in the act of communication that the ontological meets the epistemological in Plato's binary approach to life (diaeresis) and the resulting laws of non-contradiction and excluded middle.[77]

The primary aim of Glenn's pluralism is to challenge Plato's binary thinking and replace it with non-binary logics. The latter are, in Glenn's view, a meaningful gateway to tolerant, cosmopolitan thought and thus, to a full appreciation of traditions' internal and external plurality. Our ability to deactivate the rigid and exclusionary understanding of reality proper of binary thinking requires the opening towards a form of logical reasoning capable of transcending the laws of non-contradiction and excluded middle upon which classic logic has been built and promoted since Plato. In this sense, the value of logical pluralism, according to Glenn, lies in its ability not, as might be suggested, to *include* alterity within the notion of identity but rather to *reveal* that alterity is always *already contained* in (and thus, defines) identity.[78]

This is particularly valuable when it comes to assessing major (legal) traditions – i.e. traditions that "contain sub-traditions, either purely internal ones or lateral traditions".[79] These traditions, Glenn argues, are "epistemologically complex".[80] They "achieve complexity because of their proven ability to hold together mutually inconsistent sub-traditions".[81] To this way of operating there corresponds a "particular way of thinking… which has been described as multivalent, as opposed to bivalent, because sub-traditions are not either right or wrong but might be right in different, multiple (inconsistent) ways".[82]

The opening up of thought to cosmopolitan thinking is not only beneficial to assess (legal) traditions' identity, however. It can also assist us in unfolding the "multiplicity of contemporary legal orders".[83] As one might expect, considering the legacy of Plato's epistemology on Western thinking, this intellectual effort will take some doing. Moreover, this enterprise is

[77] See H Patrick Glenn, "Transnational Legal Thought. Plato, Europe and Beyond" in Miguel Maduro, Kaarlo Tuori, and Suvi Sankari (eds.), *Transnational Law. Rethinking European Law and Legal Thinking* (2014), p. 61, where in introducing his critique of Plato, Glenn refers to his thought on "dividing all the world [ontological] and its knowledge [epistemological] into two parts, and each of those two parts into two further parts, and so on".
[78] Bertrand Russell had made a similar point in a lecture aimed at showing inadequacy of the function that the "classical tradition" of philosophy had assigned to logic. The passage is not quoted by Glenn. In *Our Knowledge of the External World* ([1914] 2009), p. 6.
[79] Glenn, note 38 above, p. 366.
[80] Ibid., p. 367.
[81] Ibid., p. 368.
[82] Ibid.
[83] H. Patrick Glenn, "Choice of Logic and Choice of Law" in Glenn and Smith, note 41 above, 162–167, p. 165.

made particularly difficult by social obstacles too. In a contribution aimed at exploring how legal thinking should be re-thought to make room for its transnational variant, Glenn writes that "it is possible to rethink thought, in law as in all else, though it is extremely difficult to do so successfully with broad effect in society".[84] This is due to the fact that while "[t]here may not be inescapable 'laws of thought'… there are very deeply entrenched social attitudes and beliefs about thought, in all society".[85] The very first step to be taken is thus to analyse how non-binary thinking operates and what distinguishes it from its binary counterpart.

Cosmopolitan Thinking and Logics in Law

To Glenn, cosmopolitan thinking avoids the divisionary, and thus reductionist and ultimately misleading, properties of its binary counterpart. It does so to the extent that it accommodates, and makes sense of, contradictions and degrees without altering the identity of the subject under consideration. It is this very act of "tolerance", as Glenn calls it in LTW,[86] that lets the subject's identity fully appear. Glenn elaborates further on this point in the last chapter of *The Cosmopolitan State*, a fundamental work in comparative legal scholarship and public law theory. Glenn's views (including his methodology of inquiry) ought to be appreciated against the book's thesis that "the state is best seen as the instantiation of legal tradition, and even traditions".[87]

Glenn's analysis on the importance of paraconsistent logics in law TCS commences with a (by now rather usual) reference to Oliver Wendell Holmes Jr.'s statement that "the life of the law has not been logic, but experience".[88] After having briefly commented on Holmes' account and later, "less categorical"[89] views in which "[t]here might be a place for logic in legal reasoning",[90] Glenn's discussion moves on to tracing the origins of Western binary thought and the related laws of non-contradiction and excluded middle, mentioned earlier.[91] Plato, Glenn notes, "appears to have been the original source"[92] of this divisionary approach to life.

[84] Glenn, note 77 above, p. 61.
[85] Ibid.
[86] Glenn, note 38 above, p. 372. See also *id*., note 77 above, p. 68: "A world of multiple values appears to require a multivalent logic tolerant of what might initially appear as contradiction, and necessarily including a middle ground".
[87] H. Patrick Glenn, *The Cosmopolitan State* (2013), p. 259. Hereinafter 'TCS'.
[88] Ibid.
[89] Ibid.
[90] Ibid., p. 260.
[91] See also Glenn, note 77 above.
[92] Glenn, note 87 above, p. 262.

Moreover, Glenn aptly observes that "[t]his is probably Plato's most successful idea"[93] as "[i]t has had enormous effect in the world in spite of its early, and crude, character".[94] However, the "endless chain of separation, binary division, and classification"[95] that Plato's systematisation of nature led to "was largely lost during the early middle ages"[96] and only partly re-discovered in the twelfth century. Yet, Glenn continues, "Platonic forms of reasoning"[97] eventually re-emerged and came to inform conceptual elaborations in the philosophical, political, and juridical thinking of such figures as Bodin, Hobbes, and Kelsen.

Another important step in the renaissance of binary thinking was taken with the advent of codification, which "had, as its most essential role, the elimination of diversity within states".[98] Further, "codes themselves were elaborate efforts towards logical coherence, understood in the classical sense".[99] Glenn also concedes that "[t]he role of binary logic in all of this can never be precisely established".[100] However, he continues, "its visibility precludes any conclusion that is played no role".[101] This is a key-passage in Glenn's reflections as it serves to contextualise his overall argument regarding the beneficial properties of non-binary thinking by highlighting a specific feature of divisionary approaches to reality. Indeed, after having asserted that "Holmes was correct to back away from his initial position"[102] on law being a matter of experience rather than logic, Glenn further specifies that "[i]t is not the case… that classical or binary logic is entirely incompatible with cosmopolitan perspectives. There are cosmopolitan limits to the closure it would bring about".[103] As is the case with every closure, the closures that characterised the age of nationalisms were therefore deemed to be only partially successful due to the fallacy of their constructivism rationalism, as Friedrich Hayek observed: "closures are never definitive and ongoing texture provides the stuff of newer and larger forms of coherence".[104]

Glenn later returns on this point, after having touched on two non-binary forms of logics: multivalent and modal. Regarding the former, Glenn notes that it predates Aristotle and that its

[93] Ibid., p. 261.
[94] Ibid.
[95] Ibid.
[96] Ibid., p. 262.
[97] Ibid., p. 263.
[98] Ibid., pp. 263–264.
[99] Ibid., p. 264.
[100] Ibid.
[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Ibid., p. 265.

"essential characteristic… is that it is a 'degree-theoretic' in replacing a binary option with one that tolerates degrees, usually expressed as degrees of truth (as in the statement 'there is some truth in that')".[105] Modal logic is instead concerned "with different modes in which things may be true or false, particularly their necessity, possibility, or impossibility".[106] Importantly, "[t]he cosmopolitan dimension of modal logic is found in the idea that modes might vary according to 'possible worlds' in which they are found".[107] Yet, Glenn duly observes, "[o]ne difficulty may be in the fact that modal logic is often treated as simply supplementary to classical logic, not challenging it as directly as does multivalent logic".[108]

Glenn moves on to briefly describe the "explicit legal challenge to classical logic"[109] from Stephen Toulmin to Neil MacCormick, passing through some of the leading cases on the subject, such as the *Kosovo* decision of the International Court of Justice. Noting that the "[d]ebate on the application of the new logics to law… is still in its infancy",[110] Glenn substantiates his argument on the limits of rational closures through a contextualisation of the cosmopolitan logics that inform the three case studies he discussed earlier – constitutionalism, common laws, and institutional cosmopolitanism.[111] Each of these cases proves that despite what might be contrary thought, law has "already discovered cosmopolitan forms of logics".[112] In this sense, learning from past experiences, "[t]he task for a cosmopolitan, paraconsistent logic in law would… be to acknowledge legal contradictions, to preserve existing legal diversity, and to provide cosmopolitan and practical forms of dispute resolution for the judge of the cosmopolitan state".[113] Having so claimed, Glenn commences his reflections on "cosmopolitan logics and legal diversity" by saying that:

> Binary or classical logic is hostile to the existence of contradictions in law, either seeking to eliminate them though legal means (legal unification or application of superior, priority-giving principles) or rejecting the possibility of legal resolutions of them (since an extra-legal intervention is required, or both).[114]

[105] Ibid., p. 267.
[106] Ibid., p. 268.
[107] Ibid.
[108] Ibid.
[109] Ibid., p. 269.
[110] Ibid., p. 272.
[111] Ibid., pp. 111–161.
[112] Ibid., p. 274.
[113] Ibid.
[114] Ibid.

Fortunately, Glenn continues, by transposing pluralist thinking's properties within the legal dimension, cosmopolitan forms of legal ordering reject binary logic's *dicta* in two ways. First, as in the private law dimension, they "fully accep[t] the existence and even the need for recognition of contradictory norms".[115] Secondly, they "avoi[d] univalent choice between norms seen as conflicting".[116] Thus, as indicated above, what in binary thinking would be an element of violence and conflict is transformed into its opposite, i.e. an act of tolerance. This is because "[c]osmopolitan logic works within a larger intellectual cadre. There is no single unity to be obtained, but conciliatory recognition of multiple unities, corresponding to the present state of the world".[117]

Embracing this inclusive mode of thinking would let us appreciate that constitutionalism has never been "dichotomous".[118] More particularly, "[t]he dichotomous nature of constitutionalism breaks down in constitutional experience… and this is demonstrably so with respect to the origin of states, the failure of states, and the functioning of states".[119] A similar point can be made regarding the development of "the notion of common law over the last three centuries"[120] which, Glenn claims, has been characterised by "national and jurisdictional closures".[121] Thus "[t]he underlying logic of common laws [has never ceased to be] cosmopolitan or multivalent in character".[122] Regarding "institutional cosmopolitanism", its "essential feature… is the coexistence of institutions, often on the same territory. Their mutual recognition dispels any notion of a single locus of sovereign authority and ensures the legitimacy of both".[123] This applies to internal (i.e. between public actors or public and private actors) as well as external relations, of which the European Union is a clear example, as Glenn demonstrates drawing on such scholars as Nico Krisch, Miguel Maduro, and Nicholas Barber.

[115] Ibid.
[116] Ibid., p. 275.
[117] Ibid.
[118] Ibid., p. 276.
[119] Ibid.
[120] Ibid., p. 283.
[121] Ibid.
[122] Ibid., p. 284.
[123] Ibid., p. 286.

THE PHILOSOPHY OF ENZO MELANDRI

Introducing Enzo Melandri

There are several reasons for exploring Glenn's thought on classical and pluralist logics through the lens of Enzo Melandri's philosophy. The first emerges from what Luca Guidetti, a student of Melandri, wrote in his afterword to one of Melandri's most famous books gathering ten lectures given in 1988, entitled *Contro il Simbolico* (Against the Symbolic):[124]

> The dominant thought in Melandri's work… is that Western philosophical culture ought to be understood as the continuous representation, at different levels, of the same semantic schemes and intellectual stances which were already present in ancient times with regards to the notion of *identity*.[125]

Further, Guidetti tells us that to Melandri, in the Western tradition, "identity serves 'to restore order in the world' against our originary and daily gaze caused by the 'astonishment' of realising that [the world] is not as it first appears".[126] Finally, Guidetti further observes that this process of "restructuration",[127] and thus, we might add, of meaning-generation, develops in two phases. The former corresponds to the archaic philosophers' isomorphism and revolving around the "elementary, intuitive, and pre-symbolic (a=a)"[128] notion of identity where "thought and reality"[129] overlap; the latter emerges out of the critique of isomorphic thinking through the development of a notion of "motivational and functional notion of identity, eminently symbolic and discursive (a→A), where 'A' is the concept, the substance, or the idea".[130]

Guidetti's comments make it clear that Melandri focussed his efforts on the processes through which identity and its meaning are generated and conveyed. As I show below, Melandri's philosophical stance on these themes clearly relates to Glenn's views on the ontology (identity) and epistemology (communication) of traditions, discussed earlier. While some might contend that Glenn does not directly embark upon philosophical (including phenomenological) thinking, the inherently philosophical nature of his reflections is confirmed not only by his

[124] Enzo Melandri, *Contro il Simbolico* ([1989] 2007). Hereinafter 'CS'.
[125] Luca Guidetti, "Postfazione", in Melandri, note 124 above, 295–302, p. 298. Emphases in original. All translations are mine.
[126] Ibid., pp. 298–299.
[127] Ibid., p. 299.
[128] Ibid.
[129] Ibid.
[130] Ibid.

remarks on Plato and other philosophers but also by the very nature of his analysis. Hence the relevance of contextualising Glenn's scholarship on the subject through the work of a philosopher and phenomenologist like Melandri, who not only offered invaluable insights on how reality is apprehended and shared, but also made significant contributions on logical and analogical reasoning.

Another reason to read Glenn and Melandri together is that, as will be demonstrated, to the latter, the original terrain of analogy is that of contrariety (and corresponding 'symmetry', or 'di-polarity') between its elements. Analogical reasoning, which to Melandri defines the very nature and operativity of philosophical thinking, not only proceeds by *comparing* its elements, but in certain instances, it does so *proportionally*: every analogy, be it of qualitative (attribution) or quantitative (proportion),[131] is and can only be a "*medium comparationis*".[132] Analogical thinking thus lies at the threshold of comparative and philosophical inquiry.

Finally, the pertinence of the proposed discussion is confirmed by the fact that despite being a philosopher and not a lawyer, Melandri had a strong interest in legal reasoning and argumentation as demonstrated by his 1968 article on the subject.[133]

Before going any further, however, it is necessary to provide some background information on Melandri as both his person and thoughts are fairly unknown in the English-speaking world. Born in Genoa in 1926, Melandri graduated in philosophy from the University of Bologna in 1958, to then take a lectureship in Italian language at the University of Kiel in West Germany (1958-1961). Melandri later returned to Italy to teach various philosophical subjects (including theoretical philosophy) at the universities of Lecce, Bologna, and Trieste until his death in Faenza in 1993. A prolific writer,[134] Melandri's *magnum opus* is the book *La Linea e il Circolo* (The Line and the Circle), discussed in this article. First published in 1968 and counting twenty-one chapters divided in three parts and 154 sections (for a total of more than 800 pages, in its current edition), with extensive passages from original sources in German, French, English, Greek, Latin, LC is an incredibly dense work of continental philosophy and a magisterial example of the analytical depth and accuracy that characterise Italian doctrinal thought. Unfortunately, until recently LC has not received the attention it deserves. As Giorgio

[131] Ibid., p. 235. I return to this below.
[132] Ibid., p. 166.
[133] Enzo Melandri, "È Logicamente Corretto L'uso dell'Analogia nel Diritto?", *Rivista Trimestrale di Diritto e Procedura Civile* , XXII (1968), p. 1.
[134] For a full bibliography, see the appendix to Enzo Melandri, *La Linea e il Circolo*. *Studio Logico-Filososofico sull'Analogia* ([1968] 2017), pp. 843–860. Hereinafter 'LC'.

Agamben aptly notes in his introduction to LC's new edition, this was due to internal fights within the Italian academy.[135] However, the fact that a prominent publisher has decided to publish it anew[136] and that Agamben, arguably one of the greatest and most discussed living philosophers, wrote an introductory essay in which he defined it as "a masterpiece of twentieth century European philosophy",[137] are testament to its ongoing significance.

Logic and Analogy in Melandri's Thought

A comprehensive discussion of Melandri's dense philosophy in LC would require an extended treatment, certainly more than can be provided here. Hence, I limit myself to setting out those elements of Melandri's analytics that relate to my present argument. Melandri's aim in LC is twofold. First, to show that "logic does not exhaust the field of the rational".[138] There is indeed another form of reasoning that, contrary to what has been argued, is fully rational. This is reasoning by analogies, something that we all do "ten, one hundred, a thousand times a day".[139] Secondly, Melandri wants to show that logic and analogy mutually inform each other through a relationship of "transcendental complementarity"[140], rather than opposition. This means that the relationship between logic and analogy is itself *analogical*.[141] I return to this below.

Having set out the limits of other approaches to the subject (i.e. natural-historical; critical-historical; semiotic; etc.), Melandri explains why, to substantiate the above claims, he opted for a philosophical archaeology that is both phenomenological and transcendental. In particular, Melandri tells us that his intention is "to combine the thematic [dimension] and the structure" of analogical thinking in a journey through the "topics" and "functions" that define it.[142] Being an archaeology, Melandri further specifies, his analysis can only be deconstructive and regressive and thus operates differently from processes of rationalisation, which are

[135] Giorgio Agamben, "Archeologia di Un'Archeologia", in Melandri, note 134 above, xii–xxxv, p. xi.
[136] Five new editions have been published between 2004 and 2017.
[137] Agamben, note 135 above, p. xi.
[138] Melandri, note 134 above, p. 323.
[139] Ibid., p. 10.
[140] Ibid., p. 371.
[141] Ibid., p. 373.
[142] Ibid., p. 29.

naturally progressive and future-oriented.[143] Melandri's choice is anything but casual. As he writes,

> [a]rchaeology is subliminal, in that it moves beneath the discriminatory line of historiography and history, conscious and unconscious, rationalised and irrational. As all that which is subliminal, archaeology too is based on the principle of analogy and not on that of identity and difference.[144]

Two things should be noted about this statement. First, Melandri makes an indirect reference to binary logic's exclusionary razor, an element which also features at the centre of Glenn's analysis. Secondly, Melandri's statement might hide a fatal inconsistency: indeed, the reader might question how Melandri can claim that archaeological inquiry is a-rational and analogical, while at the same time asserting that analogical thinking is fully rational. The answer lies in the *negative* use that archaeology makes of reason in its regressive movement. Crucially, Melandri goes on, from a logical point of view, analogies' regressive dynamics make no sense and appear "pseudo-scientific".[145] However, despite being "extra-logical",[146] analogical inference is ultimately rational. Logicians' view that "analogy is not a legitimate form of inference but is, at most, a trope or a mode of induction"[147] is therefore misplaced and misleading.

Logic's and Analogy's Rationality

As seen in the previous Section, to Melandri the field of the rational is not exhausted by logic. Analogies too are a rational tool without which human thinking cannot operate. Melandri reiterates this point at the end of what is arguably LC's most important chapter, entitled 'Symmetry'. As Agamben argues in his introduction to LC, Melandri neither "thematically"[148] defines what an analogy is, nor is "'the principle of analogy', which is repeatedly evoked in contraposition to [logics'] 'principle of identity'… clearly formulated".[149] This can be easily explained by recalling that, according to Melandri, there is no such thing as a concept of

[143] Ibid., pp. 66–67. See also Agamben, note 135 above, p. xxii.
[144] Ibid., p. 67.
[145] Ibid.
[146] Ibid., p. 370.
[147] Ibid., p. 311. See also ibid., p. 12.
[148] Agamben, note 135 above, p. xv.
[149] Ibid.

'analogy'. If a concept is "a genre which includes all sub-species",[150] then analogical reasoning escapes conceptual representationalism. Yet Melandri's definition of analogy can be worked out through a close reading of this chapter and in particular of the table in which he sets out and compares what he believes are the seven principles governing the complementary relationship between logical and analogical forms of reasoning.[151] Logical thought, Melandri asserts, "hinges on seven, extremely solid principles"[152] to which there correspond an equal number of "contrary principles"[153] in its analogical counterpart. This explains why logic and analogy are transcendentally defined by their complementary *as* contrariety, which Melandri defines in terms of "inverse proportionality".[154] Three of these principles are of particular interest for our purposes. These are:[155]

Logic:

1) Principle of *'everything-or-nothing'*, of *bivalence* (true-or-false), and of *the excluded middle*.
2) Principle of *excluded contradiction*.[156] The presence of a contradiction in the premise voids the inference of every probabilistic value.
3) Principle of *elementary identity*: given two complementary predicates, *P* and *–P*, to any given subject *x* there belongs necessarily either one or the other…

Analogy:

1) Principle *of continuous graduation*, of *dipolarity* (between true$_{max}$ and false$_{max}$) and of *the included middle*…

[150] Melandri, note 134 above, p. 311. See also ibid., pp. 15 and 22; *id*., note 124 above, p. 22.
[151] Ibid., p. 375.
[152] Ibid., p. 376.
[153] Ibid., p. 377.
[154] Ibid., p. 373.
[155] Ibid., p. 375.
[156] Corresponding to the principle of non-contradiction in Glenn's work.

2) Principle of *included contradiction*, of *contrariety*, and of *tension*. No contradiction is decisive, ever. An inference proves something when leading to a paradox only.
3) Principle of *functional identity*: the subject has no identity in itself, but only as x value meeting the requirements of the function it depends on…

Interestingly, the same exact principles and table appear in Melandri's 1968 article on legal reasoning and argumentation,[157] which I briefly consider in the next Section. What interests me here is that according to this comparative analytics, analogy's ontological strength is that it creates a *relationship of contrariety* ("*A*↔*B*"[158]) between its elements. Contrary to what occurs with logic's principle of non-contradiction ("*A*/–*A*"[159]), analogical thought places its elements in a relationship of inverse proportionality, or *constitutive symmetry*, which lets them appear for what they *truly are*.

Here Melandri goes back to Aristotle, who famously observed that, while logic can move from the universal to the particular and vice-versa (deductive and inductive logic), analogy can only move from the particular to the particular. Analogy is, to Aristotle, a special form of inference that operates paradigmatically. Melandri agrees with Aristotle's findings, but rejects the premises of his analysis, which he defines as "fundamentally incorrect"[160] and, he claims, have "generated a confusion still lasting today".[161] In particular, the problem with Aristotle's "incongruent"[162] classification is that "it is based on the nature of the terms – general or particular – and not on the form of argument"[163] around which analogical thinking revolves. This not only distracts us from the way analogical arguments operate but obfuscates their capacity to overcome what Melandri calls the 'ontological chasm' between name and language, or nominal and propositional semantic, which has been affecting Western philosophy (and, consequently, thinking more generally) since its origin.

[157] Melandri, note 133 above, pp. 13–14.
[158] Melandri, note 134 above, p. 371.
[159] Ibid.
[160] Ibid., p. 318.
[161] Ibid., p. 425.
[162] Ibid., p. 318.
[163] Ibid.

I discuss the latter theme in the next Section. First it should be noted that, to Melandri, moving away from Aristotle and his followers has profound repercussions on how reality is approached and comprehended. What Aristotle and subsequent thinkers, particularly John Stuart Mill, did not realise is that what renders analogical reasoning special is the fact that its 'extra-logical' rationality generates, as already noted, a constitutive symmetry between its objects. Agamben aptly summarises Melandri's argument on this point by saying that by introducing a *tertium comparationis* in addition to the two terms around which logic's dichotomous dynamics revolves ('neither A, nor B, but C'; as opposed to 'either A or B'), every analogy can be thought of as a "field" created by the "vectorial tensions" between the three terms.[164] The creation of this field, or space of appearance, proves that analogies void the exclusionary properties of logical thinking. This is also why, in contrast to the latter, analogical reasoning welcomes intermediate gradations and proportions ("$true_{max}$ and $false_{max}$").[165]

Analogies, then, have linguistic-ontological constitutive properties. Yet, it might be noted, Melandri's argument begs the interrogative as to whether analogical reasoning, in both its operativity and scope, can in fact be distinguished from pluralist logics – that is to say, those forms of logic which, according to a view also shared by Glenn, challenge the exclusionary approach to life proper of binary thinking and logic. It is indeed commonly thought that, as is the case with analogical reasoning, pluralist logics too are characterised by the introduction of various *tertia comparationis* that deactivate classical logic's exclusionary dynamics. Melandri, however, disagrees with this view: while "non-Aristotelian logic" (a term which Melandri uses to refer to modal, probabilistic, and plurivalent logics) does introduce a third element, it ultimately operates through the same binary exclusions that underpin classical logic. The *tertium*, Melandri argues, is never effectively *datur* in non-classical logics; it is an illusion. This is because of logic's rationality which, even in its non-orthodox variants, is that of "rectifying discourse… through a process which is as much as possible rectilinear and one-sided".[166] The problem, once again, is linguistic-ontological: "logic's language… only provides reality with a form, but… communicates nothing".[167] That of logic is, in other words, a procedural and universal, rather than substantial and finite, truth.

[164] Agamben, note 135 above, p. xvii.
[165] A theme on which Melandri returned in his 1968 article on the use of analogies in law. See Melandri, note 133 above.
[166] Melandri, note 134 above, p. 412.
[167] Melandri, note 124 above, p. 20.

Identity

It was seen above that the notion of identity plays a pivotal role in Glenn's reflections on the need for (comparative) legal scholars to overcome the exclusionary approach of binary thinking proper of classical logic. The same may be said with respect to Melandri's philosophy in general (discussed earlier), as well on his thoughts on logic and analogy. To Melandri, logic, including the various non-classical variants praised by Glenn, exerts a "legislative function" rooted in its subscription to a principle of "elementary identity" that is ultimately "monopolar".[168] Analogies move instead within a comparative space of constitutive symmetry, and thus, di-polarity,[169] where the identity of the elements under consideration can express itself fully.

Melandri also shows this by elaborating on the ways in which classical logics and analogical thinning are visually represented. In particular, logic's principle of non-contradiction is expressed by using the same term ('A') twice ('*A*/¬*A*').[170] On the contrary, analogical thinking's comparative (i.e. symmetric and di-polar) movement between its elements (what Agamben calls 'vectorial tension', mentioned above) is instead expressed by using two different terms, 'A' and 'B'.[171] Thus, while logic voids even in the symbols it deploys the alterity of the other, analogical thinking brings it to light and affirms it. The different categorisation of its own terms confirms that contrary to the logical variant, analogical rationality – especially when used in juridical analysis – hides a "creative" and "progressist force,"[172] which instead of obfuscating alterity and otherness, lets them fully appear for what they are. From this it follows that the type of truth established by analogical thinking is substantial and never "perfect"[173] (whereas the procedural truth of logical reasoning is always formal and exact).

Here we reach the core of Melandri's philosophy on logic and analogy. Indeed, in chapter four of LC, Melandri makes it clear that logic's and analogy's approach to the principle of identity ought to be comprehended on ontological, and thus philosophical, grounds. This central theme of Melandri's thought offers not only a more accurate account of what has today become a sort

[168] Melandri, note 134 above, p. 366.
[169] Ibid.
[170] Ibid., p. 371.
[171] Ibid.
[172] Melandri, note 133 above, p. 22. Melandri put forward this argument through a critique of Norberto Bobbio's view. Cf. Susan Haack, "On Logic in the Law: "Something, but not All'", *Ratio Juris*, XX (2007), pp. 1, 23.
[173] Melandri, note 134 above, p. 166.

of *cliché* in philosophical circles – i.e. language's nihilism over reality, a categorisation which is too simplistically deployed without reaching the analytical depth reached by Melandri.[174] More fundamentally, it is also one of peculiar relevance for our discussion given that it is this article's claim that beneath Glenn's reflections on logical pluralism there lies a *philosophical* problem (discussed below).

Melandri's analysis in that chapter focuses on the above-mentioned conflict between the plane of the 'name' and that of 'language', or "nominal" and "propositional semantics",[175] which, he asserts, has never ceased underpinning and defining Western philosophy since its inception. According to nominal semantics, the most important element of language is the name. It is the name that has and conveys meaning through a direct and performative relation to (extra-linguistic) reality. Melandri explains that nominal semantics is "denotative" and "extensional", drawing from Aristotle.[176] While this approach has clear benefits (including "leading to a univocal type of language" through a "combinatory syntax"[177]), it also creates significant problems. Among these stands the association of reality with the ontic at the expenses of its ontological character. Propositional semantics offers a way out of this ontological impasse by prioritising the various elements of language, including their functional difference, without which there could be neither internal (i.e. within language) nor external (i.e. extra-linguistic) intelligibility.

The first mode in which the 'name-language' antithesis materialised itself was that of the tension between the Parmenedian *epos* and the Heraclitean *logos*.[178] The fact that these two planes can only overlap "*per accidens*"[179] leads to an "ontological chasm", which, as Agamben observes, "involves language's (and, thus thought's) very reference to being".[180] Melandri defines this ontological non-coincidence thus: "Heraclitus centres semantics on the name and in so doing, discovers the contradictoriety of the *logos*. With Parmenides, the opposite occurs: semantics fully coincides with the proposition. In this way, Parmenides discovers the

[174] See, for instance, Roberto Esposito, *Persons and Things*, trans. Zakiya Hanafi ([2014] 2015), pp. 57–98.
[175] Melandri, note 134, p. 157.
[176] Enzo Melandri, *Alcune Note in Margine all'Organon Aristotelico* ([1965] 2017), pp. 35–42.
[177] Melandri, note 134 above, p. 620.
[178] Ibid., p. 162–175. See also Martin Heidegger, *Being and Time*, trans. John MacQuarie and Edward Robinson ([1927] 2008), pp. 256–273.
[179] Ibid., p. 157.
[180] Agamben, note 135 above, p. xxiv.

contradictoriety of the *epos*."[181] The fracture that arises from these opposing views is *ontological* because:

> if the individuation of what is real is based on the semantic univocity of the name, then language as a whole will result irreal because equivocal; on the contrary, if the individuation of what is real is based on the semantic univocity of [linguistic] proposition[s], then the nominal reference [within language] turns out to be irreal because equivocal.[182]

It is in the space opened by this tension, Melandri contends, that humankind witnessed the emergence of philosophical thought and its double-featured concern with what plurality is and how language can express it effectively.[183] As Agamben notes in his commentary on Melandri, "[p]hilosophy originates in Greece as the attempt of resolving in some way the ontological chasm which threatens to sink language's very possibility to refer to the world".[184] With his analysis, Agamben continues, "Melandri has showed that this attempt cannot but pass from the desaturation of the principle of identity and the introduction of the principle of analogy".[185] Melandri's central claim is that by *letting* (instead of *making*, as classical and pluralist logics do), through the operational device of the *tertium comparationis*, things appear, analogical reasoning deactivates the ontological chasm between language and name by establishing a performative balance between their respective spheres – a middle ground of *meaningful* phenomenological denotations. As Melandri writes: "[t]he critique of the principle of identity does not determine the introduction of the principle of analogy, but it is its immediate prerequisite".[186] The detachment of reality (*physis*) from thought (*logos*) operated by Plato's exclusionary logic – a subject on which Glenn expended much effort – can only be challenged on the plane of this ontological *emergence*.[187]

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[181] Melandri, note 134 above, p. 166. See also *id*., note 176 above.
[182] Ibid.
[183] Needless to say, this interrogative also extends to language's internal dynamics and specifically to what distinguishes the nature and functions of the terms that constitute a discourse's semantics and make communication and understanding possible. We may call it language's 'internal plurality'. See Paolo Virno, *Saggio sulla Negazione. Per una Antropologia Linguistica* (2013), p. 110, now available in English as *Essay on Negation. For a Linguistic Anthropology*, trans. Lorenzo Chiesa (2018).
[184] Agamben, note 135 above, p. xxv. See also Giorgio Agamben, "Experimentum Vocis", in *Che Cos'è la Filosofia* (2017), pp. 13–45, now available in English in *What is Philosophy?*, trans. Lorenzo Chiesa (2017); Donatella Di Cesare, *Sulla Vocazione Politica della Filosofia* (2018), p. 18.
[185] Agamben, note 135 above, p. xxv.
[186] Melandri, note 134 above, p. 182.
[187] Ibid., p. 188.

SOME REFLECTIONS

Setting the Level of Argument

If one were to summarise Glenn's take on pluralist thinking, one could draw from Luce Irigaray and say that the overcoming of binary modes of reasoning is the gateway for the discovery and promotion of a relational culture of normative diversity within comparative legal studies.[188] This approach ought to be warmly welcome to the extent that it challenges the instrumentalist use that, over the past few decades, comparative law has made of cultural identities and differences.[189] In this sense, it can hardly be disputed that Glenn's reflections might also assist scholars in solving some of comparative law's "never-ending methodological self-doubts"[190] and therefore reaching its much-awaited "maturity".[191]

As this article shows, however, Glenn's thought has far-reaching implications that transcend the purview of scholarly discourses on comparative law's nature, scope, and method(s). In particular, Glenn's analysis on cosmopolitan thinking suggests more fundamental questions regarding plurality's ontological register. As mentioned earlier, this theme lies at the core of Western philosophy. Yet it also concerns Western jurisprudence, and specifically its constructivism – that is to say, its dependency upon reason's and knowledge's structuring properties as epitomised by logical and analogical thinking, and conceptual representationalism.

While there is general agreement that Western jurisprudence has been constructivist since its very inception in the Late Roman Republic (dating to the second century BC),[192] scholars

[188] This is not to say that Glenn was genuinely a member of any of the various groups legal pluralists revolve around (I thank Jaakko Husa for making this point).
[189] Mathias Siems, *Comparative Law* (2018), pp. 135–137.
[190] Peer Zumbansen, "Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance" in Maurice Adams and Jacco Bomhoff (eds.), *Practice and Theory in Comparative Law*. (2012), pp. 186, 188.
[191] Esin Örücü, "Developing Comparative Law" in Esin Örücü and David Nelken (eds.), *Comparative Law: A Handbook* (2007), pp.43, 44. Cf. Husa, note 36 above, pp. 46, 103, 114, 116.
[192] As Husa has noted while commenting on an earlier draft, some might object that the Scandinavian and/or American Legal Realists were not 'constructivist', at least to the extent that they were, and still are, primarily interested in how law actually functions in society rather than in conceptual, 'law-in-books' analysis. I have, however, some reservations about the American Realists, which for space limits I cannot expound here. I will limit myself to pointing to the remarks on the topic made by Neil Duxbury, *Patterns of American Jurisprudence* (1995), pp. 79–80, and saying that if, as Glenn (see note 50 above) himself knew full well, 'theories are rational constructions', then so are even those put forward by the American Realists. With respect to Scandinavian Legal Realism, see instead see instead Luca Siliquini-Cinelli, "Vilhelm Lundstedt's 'Legal Machinery' and the Demise of Juristic Practice", *Law & Critique*, XXIX (2018), p. 241.

disagree as to whether the logical, analogical, and conceptual tools of reality-construction adopted by the Roman jurists were those which originated within Greek philosophy. The debate has mostly been of a historical rather than philosophical nature and has focused on Plato's, Aristotle's, and the Stoics' actual influence on the development of Roman juridical categories and modes of thought.[193]

For the purposes of this article, I propose to move the discussion from the historical to the philosophical plane. I submit that it is neither in Plato nor in Aristotle or the Stoics but elsewhere that we might find the philosophical paradigm that might shed new light on Western jurisprudence's constructivist attitude. Indeed, as with Western thinking more generally, Western jurisprudence's constructivism is philosophically related to the inception, with the Promethean myth, of a particular type of metaphysical thinking that uses reason and knowledge for ordering purposes. Reason and knowledge existed, of course, well before Aeschylus. However, as Emanuele Severino has shown, it is with Aeschylus' works that they are both conceived, for the first time, as metaphysical devices to be used for controlling factical experience and transcending human finitude. Prometheus is the god who knows everything in advance (*pro-mathḗs*) and whose thinking moves on a rectilinear plane on which all that exists is effectually commeasured (*pánt' epistathmṓmenos*). Following his 'free will', Prometheus decided to donate *tékhnē* to humankind so that it could liberate itself from the fear of pain, death, and unpredictability. He did so by placing a 'blind hope' in humans' hearts, i.e. the hope to be capable of freely disposing of the world, and thus to forget human finitude and inevitable destiny.[194] Soon thereafter, however, Prometheus realised that he had made the terrible mistake[195] of thinking that *tékhnē* could free humankind from Necessity (*Moira*).[196] In realising that nothing can escape Necessity, Prometheus reached his potential to see the future and gained a comprehensive, causal vision of phenomena. In other words, Prometheus moves from *tékhnē* to *epistḗmē*.[197]

[193] Kaius Tuori, *Ancient Roman Lawyers and Modern Legal Ideals: Studies on the Impact of Contemporary Concerns in the Interpretation of Ancient Roman Legal History* (2007), pp. 52–58; James Gordley, *The Jurists. A Critical History* (2013), pp. 12–18.
[194] *Promethues Bound* 248–262 and 436–506.
[195] Ibid., 112.
[196] Ibid., 514.
[197] Emanuele Severino, *Il Giogo. Alle origini della Ragione: Eschilo* (1989), pp. 184, 188.

Two things should be noted here. First, to Aeschylus, "Prometheus' heroic strength"[198] resides precisely in having realised that only through "[*epistḗmē*'s] incontrovertible truth"[199] humans can evade (that is, constructively dispose of) their facticity. However, and this is the second point, when Prometheus gave humankind a blind hope in the technical disposition of the world, he mistakenly led them to believe that procedural truth is capable of saving life from its finitude. With the movement from *tékhnē* to *epistḗmē*, the empowering belief of the former also came to define the latter: in the end, it is knowledge as achieved by the capacity to reason (i.e. commeasure ends with means for instrumental purposes) that liberates both Io and Prometheus, and thus mortals, from chaos and pain.[200] This also confirms the regulatory – and thus never merely descriptive – character of knowledge and reason over reality. *Epistathmṓmenos* (meaning 'to measure' and which, Severino observes, is the "verbal mode through which *epistēmē* presents itself"[201]) derives from the substantive *státhmē*, which was the rope used to measure and work stone and wood in Ancient Greece, and which means "norm" or "rule".[202]

Adopting this philosophical perspective of inquiry has, I submit, meaningful implications. The most important of which is that it helps us appreciate that while debate on the role that the Platonic, Aristotelian, and Stoic structuring of thinking and language has had in the development Western jurisprudence is certainly important, it should only be done after having uncovered the Agambenian zone of interaction, or indistinction, where the scientification of life and *ius* and the metaphysical construction of reality meet. On the reading proposed here, the claim that Roman juristic science was not a science in the modern sense of the term because it was instead an *ars* will have to be reconsidered: originating from Prometheus,[203] no *ars* (*tékhnē*, in Greek) can do without reason's metaphysical constructivism nor operate without epistemic ambitions. The same applies to the literature that emphasises the movement from the casuistic, roughly inductive method of the Roman jurists, to the more refined inductive, dialectical and analogical one of their medieval counterparts, to the deductive and axiomatic

[198] Emanuele Severino, *La Filosofia dai Greci al Nostro Tempo. La Filosopfia Antica e Medievale* ([1996] 2010), p. 82.
[199] Ibid., p. 82.
[200] Severino, note 197 above, pp. 31, 79–80, 185, and 187–196. "*Epistḗmē*", Severino writes referring to Prometheus, "is indeed reason because it is deemed capable of overcoming prejudice and error", in *La Filosopfia dai Greci al Nostro Tempo. La Filosofia Moderna* ([1996] 2013), p. 242. My translation.
[201] Ibid., p. 28.
[202] Ibid.
[203] *Prometheus Bound*, 506: πᾶσαι τέχναι βροτοῖσιν ἐκ Προμηθέως.

methods of humanist and modern thinkers. Here too the pervasive role of reason and knowledge has been overlooked. An alternative view is offered in what follows.

Logic, Analogy, and Conceptual Representationalism in Law

A clarification is in order at this point. A treatment of the origins and development of Western jurisprudence as a rational and epistemic activity (*scientia iuris*) is beyond the scope of this article. The topic has already been extensively explored in both the Common and Civil law traditions by those thinkers who promoted a scientific approach to law and legal reasoning or inquired whether law is a social science, as well as by those who wrote on such topics as legal methodology and epistemology.[204] For the purposes of our discussion it will suffice to note the following.

According to Schiavone, the separation, with the promulgation of the Twelve Tables in 451-450 BC, of *ius* ("the original nucleus… of Roman civic ordering… based on the rules of an ancient practice, once intermingled with religion and cult rituality"[205]) and *lex* ("the regulatory presence of 'the rule of the people'"[206], or "political rule"[207]) has represented a major disruptive event in Western law. One pivotal consequence of this ontological break[208] was that it led, starting from the fourth century BC,[209] to the transformation of juristic thinking and practice into *scientia iuris* – that is, an abstract "cognitive operation",[210] or "intellectual practice",[211] which rendered "law an authentic form of metaphysics"[212] and became "the motor of any

[204] In the English-speaking world, among others see Harold J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (1983); Gordley, note 193 above; Aldo Schiavone, *The Invention of Law in the West*, trans. Jeremy Carden and Antony Shugaar ([2005] 2012), pp. 92–98, 112–127, 135, 177–225; Geoffrey Samuel, *Epistemology and Method in Law* ([2003] 2016), ch 2; Aleksander Peczenik, *Scienta Juris. Legal Doctrine as Knowledge of Law and as a Source of Law*, in A Treatise of Legal Philosophy and General Jurisprudence, Vol IV (2005); Fritjof Capra and Ugo Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (2015).
[205] Schiavone, note 204 above, p. 134.
[206] Ibid.
[207] Ibid., p. 135.
[208] Ibid., p. 95.
[209] Ibid., pp. 107–108.
[210] Ibid., p. 203.
[211] Ibid.
[212] Ibid., p. 202.

development of *ius*".[213] With time, this led to the jurists' "self-isolation… in a universe made solely of forms, propositions, defined and hidden compatibilities".[214]

It can hardly be disputed that, despite all the methodological shifts that have characterised Western jurisprudence's development,[215] legal analysis, reasoning, and argumentation have been functioning along similar lines since Roman times. True, the Romans did not have law schools in the modern (i.e. medieval[216]) sense of the term.[217] And true, as Geoffrey Samuel has correctly observed, the Roman jurists "were not interested in formulating definitions and theories".[218] Nor was their reasoning ever "advance[d] beyond the inductive stage".[219] This certainly cannot be said with respect to the juristic activities of the medieval and modern periods, when more refined inductive as well as deductive methods of analysis were developed. Yet, few would doubt that the juridical methods of metaphysical abstraction based on reason's transcendental *modus operandi* and cognitive processes of reality-decoding that Schiavone places at the centre of Roman juristic thought have not been informing the study and practice of law in the West since then and shaped the very core of Western legal consciousness.[220]

What the West witnessed with the rediscovery of the *Corpus Iuris Civilis* in the Middle Ages was the inception of *systematic* legal education and practice revolving around rational abstraction and epistemic constructivism epitomised by logical and analogical modes of analysis and conceptual representations.[221] This is why it is only after having uncovered reason's and knowledge's Promethean substratum that a full appreciation of ancient Greek thinking's legacy over the development of Western jurisprudence (particularly after the second half of the twelfth century) is possible. Law's dependency upon reason and knowledge applies to both its study and knowledge (*epistēmē*) and the study and knowledge of how to reason/think

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[213] Ibid.
[214] Ibid., p. 200.
[215] Samuel, note 204 above, p. 53. More broadly, see *id*., *A Short Introduction to Judging and to Legal Reasoning* (2016), pp. 5–35.
[216] James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* ([2008] 2010), pp. 1, 80, 223.
[217] O.F. Robinson, *The Sources of Roman Law: Problems and Methods for Ancient Historians* (1997), pp. 42ff.
[218] Samuel, note 204 above, p. 96.
[219] Ibid., p. 64.
[220] Schiavone, note 204 above, pp. 3, 285–286; Gordley, note 193 above, p. 18, chs 8–9, and p. 312; Samuel, *A Short Introduction to Judging and to Legal Reasoning*, note 215 above, pp. 11–33. See also Ronald D. Kelley, *The Human Measure. Social Thought in the Western Legal Tradition* (1990), pp. 116, 138.
[221] Berman, note 204 above, pp. 120–164; Antonio Padoa Schioppa, *Storia del Diritto in Europa. Dal Medioevo all'Età Contemporanea* (2007), pp. 87–98; Andrea Errera, "The Role of Logic in The Legal Science of The Glossators and Commentators. Distinction, Dialectical Syllogism, and Apodictic Syllogism: An Investigation into the Epistemological Roots of Legal Science in the Late Middle Ages", in Enrico Pattaro (ed.), *A Treatise of Legal Philosophy and General Jurisprudence*, Vol. 7, *The Jurists' Philosophy of Law from Rome to the Seventeenth Century*, Andrea Padovani and Peter G. Stein (eds.), (2007), p. 79.

like a lawyer (*phrónēsis*). In Aristotle, whose works exerted a prominent influence on Roman and then medieval jurisprudence, particularly from the second half of the twelfth century,[222] *epistēmē* and *phrónēsis* are two of the intellectual virtues through which the mind achieves truth.[223] This mode of thought profoundly inspired the mediaeval jurists' didactics and belief – proper of medieval science's systematic abstractness[224] – that the apprehension of legal practice is a transcendental, cognitivist, and (ana)logical endeavour. After that, both the study and practice of law became wholly constructivist in the Humanist and subsequent modern periods.[225] In this sense, rather than being antithetical, s*cientia iuris* and *iuris prudentia* are two defining and mutually reinforcing elements of Western jurisprudence. Thus, Samuel too ultimately concedes that asking whether there have been Khunn-like 'revolutions' in Western jurisprudence "is asking the wrong question".[226] According to Samuel, this is because Khunn developed his theory "within the domain of the natural sciences where, of course, the object of these sciences is ultimately external and independent of the science itself".[227] On the contrary, "[l]aw is quite different as a discipline. There never really was a time when a legal theory becomes either falsified or fully incapable of offering an adequate account of the legal world".[228] The lesson to be learnt from all of this is that as a rational and epistemic activity, law cannot do without abstract techniques of world-construction (*Weltbild*).[229]

A search for the use of logical and analogical modes of judicial and scholarly analysis, reasoning, and argumentation in both Civil and Common law jurisdictions, particularly in such

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[222] Errera, note 221 above, pp. 97ff; *id*. *Lineamenti di Epistemologia Giuridica Medievale*. *Storia di una Rivoluzione Scientifica* (2006); Jacques Le Goff, *Gli Intelletuali nel Medioevo*, trans. Cesare Giardini ([1985] 2017), pp. 27, 100–101.

[223] *Nicomachean Ethics*, VI.3.1.

[224] Hans Kelsen, *Lo Stato in Dante. Una Teologia Politica per L'Impero*, trans. Wilfrido Sangiorgi ([1905] 2017), p. 51; Pier Giuseppe Monateri, *Dominus Mundi. Political Sublime and the World Order* (2018), p. 40.

[225] I discuss this in detail in a monograph currently under contract with Edinburgh University Press. For an introduction, see Padoa Schioppa, note 221 above, pp. 49, 97–98, 149–163, 251–264, 274–281, and 504–508. In philosophy, see Ernst Cassirer, *The Philosophy of the Enlightenment* ([1951] 2009), pp. 234–274.
Not coincidentally, with respect to contract and tort law in particular, Ernest J. Weinrib places Aristotle's rationality – i.e. his abstract schematisim, emphasis on "structure rather than substance", "spare and formal" account of (corrective and distributive) justice, and mathematical treatment of the subject – at the core of private law's "immanent intelligibility" and "immanent rationality". Ernest J. Weinrib, *The Idea of Private Law* ([1995] 2012), pp. 19, 57, 207. Cf. Shivprasad Swaminathan, "*Mos Geometricus* and the Common Law Mind: Interrogating Contract Theory", *The Modern Law Review*, LXXXII (2019), p. 46.

[226] Geoffrey Samuel, "Have There Been Scientific Revolutions in Law?", *The Journal of Comparative Law*, XI (2017), p. 186.

[227] Ibid., p. 213.

[228] Ibid.

[229] Cf. Samuel, *A Short Introduction to Judging and to Legal Reasoning*, note 215 above, p. 2. Yet, it might be argued that law's judgment cannot but be abstract and structured along reason's technical constructivism. See William Lucy, *Law's Judgment* (2017), p. 7; Geoffrey Samuel, *Rethinking Legal Reasoning* (2018), pp. 167, 170, 174, and 190–196.

branches of law as contracts and torts,[230] confirms the accuracy of these reflections. In literature, a good example for our purposes is Giovanni Sartor's recent call for the "correct"[231] way of reasoning in law, and significantly, his argument that "legal reasoning can be viewed as an application of a broader human competence that is, practical cognition or practical rationality".[232] Sartor, who like Glenn endorses a "*pluralist extension* of legal logic"[233] as a "way of modelling both the reciprocal closure and openness of different normative systems",[234] defines practical cognition as "the ability of processing information in order to come to appropriate determinations".[235] Not coincidentally, half of Sartor's dense analysis is dedicated to "the logical structures of legal thinking".[236] Further examples could be given, including Nicholas F. Lucas's praise of the study, in law, of "the science of the principles and conditions of correct thinking", or "the admirable mental discipline" that is logic for giving us, through rigorous "mental training… the power and habit of thinking clearly";[237] Vern R. Walker's reading of legal reasoning's pragmatic nature as resulting from the combination of, among other components, the "epistemic side of law aim[ing] at truth"[238] and deductive, inductive and abductive logic;[239] or Emily Scherwin's argument on the "epistemic and institutional advantages" of analogical reasoning in law.[240]

A Diachronic Approach to Logic's (and Analogy's) Constructivism

What has emerged from our account of Melandri's analytic on logic and analogy is that they both operate along reason's metaphysical, constructivist plane for epistemic (i.e. ordering, in

[230] The theoretical construct of the 'reasonable person' is, arguably, the best example one might give to show the Promethean character of legal abstractions. *Ad pluribus*, see *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528; *Kofous v C Czarikow Ltd (The Heron II)* [1969] 1 AC 350; *Parsons (H) (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791; *Page v Smith* [1996] 1 AC 155; *Jackson v Royal Bank of Scotland* [2005] UKHL 3; *Transfield Shipping v Mercator Shipping* [2008] AC UKHL 48. Cf. also Lord Macmillan's definition of the reasonable man in *Glasgow Corp v Muir* [1943] AC 448, 457; Viscount Simonds' statement *in Overseas Tankship (UK) Ltd v Morts Docks and Engineering Co Ltd; The Wagon Mound (No1)* [1967] 1 AC 338, PC, 424; and Lord Jauncey's in *Ruxley Electronics v Forsyth* [1996] AC 344, 357.
[231] Giovanni Sartor, *Legal Reasoning. A Cognitive Approach to the Law*, in Pattaro, note 221 above, p. 393.
[232] Ibid., p. xv.
[233] Ibid., p. 659. Emphasis in original.
[234] Ibid., p. 660.
[235] Ibid., p. xxv.
[236] Ibid., p. 792.
[237] Nicholas F. Lucas, "Logic and Law", *Marquette Law Review*, III (1919), pp. 203, 203–204.
[238] Vern R. Walker, "Discovering the Logic of Legal Reasoning", *Hoftsra Law Review*, XXXV (2007), pp. 1687, 1691.
[239] Ibid., p. 1692.
[240] Emily Sherwin, "A Defense of Analogical Reasoning in Law", *U. Chicago Law Review*, LXVI (1999), p. 1179.

Promethean terms) purposes. In particular, logic (both "the science of *truth*"[241] and "science's primary instrument"[242]) dialectically connects elements of reality by transcending their spatiality and temporality and including them in all-encompassing frameworks of intelligibility through judgement (*adaequatio rei et intellectus*). Thus, Heidegger aptly spoke of the metaphysical foundations of logic.[243] This is how, through what Ernst Cassirer – referring to Bacon's, Leibniz's, and Hobbes' attacks on scholasticism – called logic's "constructive activity",[244] beings *as* phenomena are known.

At first glance, by introducing various *tertia comparationis* within the given purview of analysis – and thus, by seemingly prioritising substance and context over form and abstractness – pluralist logics and analogical modes of reasoning seem to evade logic's 'procedural truth'. Yet, in fact, they are fully dependent upon it and replicate it under a different guise. This is not just because, as Melandri observed, rationality propels both.[245] On semantic grounds too, non-classical logics' and analogy's '-logy' suffix reveal that they both are, and cannot but be, defined negatively via reference to logic's transcendental nature and technical functioning. As the later Heidegger not coincidentally observed in a set of lectures dedicated to the Parmenidean notion of identity (which is directly related to the principle of identity discussed by both Glenn and Melandri):

> … -logy hides more than just the logical in the sense of what is consistent and generally in the nature of a statement, what structures, moves, secures, and communicates all scientific knowledge.
>
> In each case, the -Logia is the totality of a nexus of grounds accounted for, within which nexus the objects of the sciences are represented in respect of their ground, that is, are conceived.[246]

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[241] Nicholas J.J. Smith, *Logic: The Laws of Truth* (2012), p. 4. Emphasis in original. At this point, it might be objected that to offer an omni-comprehensive definition of logic is ultimately inappropriate given that its development has been characterised by profound transformations from the archaic version(s) of Parmenides, Zeno of Elea and the Megarian School's thinkers, to its humanistic (Petrus Ramus) and contemporary variants. While such criticism would certainly be sound, what the proposed definition aims to highlight is that despite such shifts, since its inception to date logic has never ceased being the (Parmenidean) procedural science of the laws of thought and expression, as per Melandri. This was discussed above, where it was seen that to Melandri, the emergence of symbolic thinking, theoretical enquiries, and objectification of reality in classical philosophy and logic lie at the root of modern science.

[242] De Monticelli, note 10 above, p. 46.

[243] Martin Heidegger, *The Metaphysical Foundations of Logic*, trans. Michael Heim ([1978] 1984).

[244] Cassirer, note 225 above, p. 253.

[245] Melandri arrives to the point of arguing that, *lato sensu*, it is logic itself that justifies analogical reasoning. See Melandri, note 124 above, p. 22.

[246] Martin Heidegger, *Identity and Difference*, trans. Joan Stambaugh ([1957] 2002), pp. 58–59.

Conceptual Representationalism, Experience, and Knowledge

The chief distinction Western thinking has been relying upon for over two millennia to synthetise (less philosophically, we could say organise) the real and make sense of plurality is between particulars and universal. Indeed, as philosophers (particularly, phenomenologists) tell us, when we ask what something is (say, a table or a friend standing before us), what we are actually asking is two interrelated questions. First, whether we only experience it/her as a factical object/subject at a given point in space and time or, rather, whether, through its/her effective presence, we also come to know what constitutes it/her (i.e. what are its/her incontrovertible, defining features as *that* particular object/subject in its/her ipseity and as opposed to another). Secondly, whether it/she is a representation (or expression) of one or more universal qualities that, while defining it/her, might also be shared by other particulars (i.e. the table's colour or that of our friend's eyes); in philosophical terms, the question here is whether *that* table/friend exhausts the essence, 'beingness', etc. of table-colourness/blue-eyeness in universal terms. Following Severino, while both queries inevitably lead to further, especially linguistic-ontological, interrogatives, they ultimately meet in a single, overreaching one: whether what is certain (our experiences, leaving scepticism aside) is also true (*epistḗmē* as incontrovertible knowledge achieved through *logos*, reason).

Unsurprisingly, being simultaneously an ethereal and situational phenomenon, law is a fertile terrain for these sorts of inquiries. Most of the time, however, in law as in other disciplines, the particulars-universals problem is approached conceptually – that is, concepts take the place of universals. In this way, being a concept "a genre which comprises all sub-species"[247], the validity of a given particular is verified (i.e. commeasured, in Promethean terms) against the defining features of the concept it is supposed (or not) to be an expression of. This assessment is carried out through various, including context-dependent, analytical reductions.

In Western philosophy, it was Socrates who first found in concepts the solution to efficiently mediate between truth and experience, or Heraclitus and Parmenides.[248] The significance of Socrates' move can hardly be exaggerated: today, a leading encyclopaedia of philosophy still states that "[c]oncepts are the constituents of thought".[249] Heidegger would have agreed: as he

[247] See note 150 above.
[248] Severino, note 198 above, pp. 113–114, 120, 183.
[249] Eric Margolis and Stephen Laurens, "Concepts", *Stanford Encyclopedia of Philosophy*, 2011. https://plato.stanford.edu/entries/concepts/ (accessed 19 June 2019).

described them, concepts are "determinative representations"[250] that act as filters through which we cognitively order what exists. Now, given knowledge's constructivism, it is usually held that non-conceptual forms of thinking lead to confusion and approximation. As Aeschylus made clear, knowledge requires order, which in turn requires categorisation along reason's metaphysical measuring properties. Not coincidentally, in an effort to think of a thinking that can do without the "calculating self-adjustment of *ratio*",[251] i.e. a thinking capable of "free[ing] ourselves from the technical interpretation of thinking",[252] Heidegger denounced that "[w]e [have come to] know rigorous thinking only as conceptual representation".[253] And indeed, if "intuitions without concepts", as Immanuel Kant reminded us, "are blind",[254] it comes as no surprise that "doing without concepts" as Edouard Machery boldly suggested, seems impracticable (to say the least).[255]

There appears to be agreement among scholars that this applies to the comparative studies of cultures, societies, and political systems on the one hand, as well as to law and legal reasoning on the other, both within and outside the comparative dimension. Regarding the former, in his last and, arguably, most important book on comparative methodology, the leading political scientist Giovanni Sartori made an important call for the overcoming of the "empirical vaporisation"[256] which, he believed, affects the comparative analysis of political structures and phenomena. This can only be done, Sartori argued, by first acknowledging that "to compare is to control";[257] and secondly, rejecting the processes of "concept malformation,"[258] "conceptual stretching,"[259] "conceptual atrophy",[260] and the various misuses of logical tools[261] around which the discipline of political science had been developing since the 1950s. This requires appreciating that "[i]n every cognitive process, at least three elements are involved: *a*)

[250] Martin Heidegger, *The Fundamental Concepts of Metaphysics: World, Finitude, Solitude*, trans. William McNeill and Nicholas Walker ([1983] 1995), p. 9. See also *id*. *Parmenides*, trans. André Schuwer and Richard Rojcewiz ([1982] 1998), p. 21, where logic is described as the "propositional theory" of "declarative assertions" according to which "propositions are composed out of words, and the latter denote 'concepts'".
[251] Martin Heidegger, *Parmenides*, trans. André Schuwer and Richard Rojcewicz ([1982] 1998), p. 50. See also *id*. *Mindfulness*, trans. Parvis Emad and Thomas Klary ([1997] 2016), p. 38.
[252] Martin Heidegger, "Letter on Humanism" in David Farell Krell (ed.), *Basic Writings* ([1947] 2008), pp. 217, 218.
[253] Martin Heidegger, *The Event*, trans. Richard Rojcewicz ([2009] 2013) 34. Emphasis added.
[254] Immanuel Kant, *Critique of Pure Reason*, Paul Guyer and Allen Wood (eds.), ([1781-1787] 1998), pp. 193–194.
[255] Eduard Machery, *Doing without Concepts* (2009).
[256] Giovanni Sartori, *Logica, Metodo e Linguaggio nelle Science Sociali* (2011), p. 31. All translations are mine.
[257] Ibid., p. 15. See also ibid., p. 52. Cf. Legrand, note 40 above, p. 128.
[258] Ibid., pp. 11–53.
[259] Ibid., pp. 27, 31, 48, and 221.
[260] Ibid., p. 112.
[261] Ibid., p. 51.

concepts; *b*) words; *c*) phenomena" and that a concept is a "conception which is treated according to logical rules".[262] The role of concepts among these elements is "central"[263] insofar as in the social sciences meaning needs to be "structured via logical rules and systematic 'coordination'".[264] Without concepts' "unity of thought"[265] and their correct use there cannot be *meaningful* comparison: rigorous "induction, observation, and experimentation"[266] as well as conceptual thinking[267] are the only means to avoid the "theoretical and empirical chaos"[268] that has been affecting the incessant "expansion"[269] of their discipline over the past few decades. With respect to comparative *legal* studies in particular, a similar point has been made by Franz von Benda-Beckmann with respect to the comparative study of legal cultures, or cross-cultural legal analysis.[270]

Moving on to law and legal reasoning, in an important essay Brian Bix has demonstrated that conceptual enquires serve different purposes. In particular, holding that "[c]onceptual analysis is an integral part of legal theory",[271] in his account Bix "offered four alternatives for conceptual claims: (1) they are arbitrary stipulations; (2) they track linguistic usage; (3) they try to explain what is 'important' or 'interesting' about some matter; and (4) they establish an evaluative test for the label…".[272] Despite their apparent difference, it could be said that what unites these functions is that they all convey *meaning*, thereby helping the interpreter to assemble reality (in phenomenological terms, the actual) for cognitivist purposes.[273]

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[262] Ibid., p. 99.
[263] Ibid., p. 101.
[264] Ibid.
[265] Ibid., p. 105.
[266] Ibid., p. 63.
[267] Of which the "simplest and oldest technique is that of classification … *per genus et differentiam*", in ibid., pp. 106–107. Emphasis in original. See also ibid., pp. 21, 51, 113, 123, 135, 141, and 219.
[268] Ibid., p. 52.
[269] Ibid., p. 12.
[270] Franz von Benda-Beckmann, "Who is Afraid of Legal Pluralism?", *Journal of Legal Pluralism and Unofficial Law*, XXXIV (2002), pp. 37, 42. But see Andrew Halpin, "The Creation and Use of Concepts of Law", in Donlan and Lukas Heckendorn Urscheler, note 16 above, pp. 169–192, 171, 187: according to Halpin, to meaningfully embrace 'legal and normative plurality' scholars should 'deprive [their theories] with [their] corresponding concept of the capacity to close off further theoretical inquiry'.
[271] Brian Bix, "Conceptual Questions and Jurisprudence", *Legal Theory*, I (1995), p. 465.
[272] Ibid., p. 479.
[273] Cf. Andrei Marmor, "Farewell to Conceptual Analysis (in Jurisprudence)", in Wil Waluchow and Stefan Sciaraffa (eds.), *Philosophical Foundations of the Nature of Law* (2013), pp. 209, 211:

> When we try to elucidate or analyze a concept, is there anything else to it than figuring out what the word, in its relevant settings, means in the language in question? It is difficult to see how it would be different… [I]t is difficult to see how the *concept* of chairs is different from whatever this word means in its standard use in English expressions.

Emphasis in original.

The latter claim can also be supported by considering other accounts, commencing with Ronald D. Kelley's historical reconstruction of "the conceptual colonization of the natural world, by which men began to lay the foundations of their own civilizing [i.e. chaos-avoiding] structure of Nomos".[274] One could also consider Dennis Lloyd's explanation of why, to operate in a "rational and systematic way",[275] the law needs concepts – "the essential tools of human reflection, communication, and decision".[276] Similarly, in a more recent essay that appeared in a volume aimed at shedding new light on how to rethink legal scholarship for the highly diverse functioning and transformative interactions of today's legal orders, Neil Komesar asserted that:

> Law is vast and complex. To explore it and to understand it requires a mode of organizing what we know and what we need to know. That means establishing a way to determine what is important and why. In short, we need an analytical framework.[277]

The point has been made by others as well. For instance, in a passage that needs to be cited in full for its relevance, Samuel holds that:

> The object of science is not the phenomenon of the real world; the object consists of the schematic construction or abstract model of this real world and science itself is the exploitation of such models to explain and predict the phenomenon modelled. This epistemological thesis is equally – or perhaps one should say analogously – applicable to law since this is a discourse or 'science' (*intellectus*) which does not operate directly on the fact (*res*). What lawyers do is to construct a model of the social world and it is, arguably, this model which acts as the bridge between the social and legal worlds. The model is both the *res* (object of knowledge) and the *intellectus* (knowing subject).[278]

Hence "[c]oncepts and categories are… fundamental aspects of legal knowledge".[279] Indeed, Samuel continues:

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[274] Kelley, note 220 above, p. 15.
[275] Dennis Lloyd, *The Idea of Law* ([1964] 1991), p. 291.
[276] Ibid., p. 284.
[277] Neil Komesar, "The Logic of the Law. The Analytical Foundations of Methodology", in Edward L. Rubin, Rob van Gestel, and Hans-W. Micklitz (eds.), *Rethinking Legal Scholarship. A Transatlantic Dialogue* (2017), p. 401. Arguably, conceptual jurisprudence best epitomises this view: see Kenneth Einar Himma, "Conceptual Jurisprudence An Introduction to Conceptual Analysis and Methodology in Legal Theory", *Revus*, XXVI (2005), p. 65.
[278] Samuel, *A Short Introduction to Judging and to Legal Reasoning*, note 215 above, p. 2.
[279] Ibid., p. 125.

> [f]acts need to be classified… making sense of acts beyond the individual case involves schemes of intelligibility that will organise these facts according to 'scientific' discourse that itself will be organised into conceptual categories. Knowledge is inconceivable without classification.[280]

This can be better appreciated if we consider that "[l]egal reasoning is about manipulating facts (*accomodatio factorum*) to make them conform in an isomorphic way with a conceptual structure implied by a legal text (statute, contract, or will) or by a precedent or line of precedents".[281] Legal reasoning's subjection to "virtual"[282] as opposed to actual facts should prompt us to reverse the maxim "*ex facto ius oritur*"[283] to "*ex iure factum oritur*".[284] Needless to say, this not only applies to factual reconstructions, but also to legal interpretation techniques in both the Civil and Common law traditions.[285] A similar argument has been made by Roger Cotterrell, a leading legal sociologist within the comparative study of legal cultures. In his new, important book, which advocates a sensitive jurisprudence capable of blending together theoretical and empirical inquiry while endorsing law's "well-being",[286] Cotterrell observes that:

> Concepts and categories are central to the lawyer's stock in trade. They are means of classifying and distinguishing situations and issues for the purposes of legal analysis. They are crucial to the organisation and systematisation of legal doctrine. And they are crucial also to social inquiry – fundamental in the construction of social theories and in the rational structuring and interpretation of empirical social research. We cannot speak or write without concepts; they are tools for the organisation of thought. So, their clarification is an obviously important aspect as of social scientific work.[287]

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[280] Ibid., p. 217. See also Samuel, *Rethinking Legal Reasoning*, note 229 above, p. 279. Cf. Andrew Halpin, "Concepts, Terms, and Fields of Enquiry", IV (1998) *Legal Theory*, p. 187.
[281] Samuel, *Rethinking Legal Reasoning*, note 229 above, p. 190.
[282] Ibid., pp. 160–167.
[283] Ibid., p. 147–151.
[284] Ibid., p. 192.
[285] Geoffrey Samuel, "Comparative Law and the Legal Mind", in Peter Birks and A. Pretto (eds.), *Themes in Comparative Law: Essays In Honour of Bernard Rudden* (2002), pp. 35, 47. See also *id*., *A Short Introduction to Judging and to Legal Reasoning*, note 214 above, pp. 173–215; *id*., *Rethinking Legal Reasoning*, note 229 above, pp. 86, 89–95, and 143–167.
[286] Roger Cotterrell, *Sociological Jurisprudence. Juristic Thought and Social Inquiry* (2018), p. 6. See also ibid., pp. 30, 53, 82, and 220.
[287] Ibid., p. 223.

Cotterrell's view is particularly important for our discussion. For not only does it exclude the possibility of thinking without conceptual representations, but it does so in a book that repeatedly stresses the importance of appreciating, within juristic analysis, experiential (i.e. contextual and local) modes of cultural living.[288]

This begs the question of whether experiences can in fact be decoded, conceptualised, and therefore known – an interrogative all the more relevant if we think of law (and regulatory dynamics) as a matter of shared normative experiences.[289] A second and related theme is whether experience can in fact be distinguished from knowledge. Phenomenological thinking offers some valuable insights in this respect. Indeed, phenomenologists commonly hold that there are two different forms of experience: *Erlebnis* and *Erfahrung*.[290] The former indicates the very factical act of living without epistemic ambitions (or lived experience), while the second involves a critical attitude towards reality that hinges on both practical reason's guiding purpose in life and the value of knowledge as an end result.[291] While only the latter mode of experience is considered, within Husserlian philosophy, the proper mode of approaching the world, it has been both directly and indirectly dismissed. According to Agamben, for instance, not only are experience and knowledge different, but the former cannot be objectified via recourse to analytical reconstructions.[292]

For the purposes of our discussion, it will suffice to note that there is still much confusion in legal scholarship regarding what distinguishes experience from knowledge, or the *nōtum* from the *cognitum*. In particular, what is yet to be grasped is that while experience is unique and imperfect, knowledge looks for certainty and truth through a logic that prompts objectification.[293] This is because, like reason, knowledge, as the Humanist Giacomo Zabarella understood,[294] can only be impersonal. One could argue, along with Husserl, that "the ultimate

[288] Ibid., pp. 53, 80, 99, 159, 162, and 222.
[289] Melissaris, note 35 above; Lindahl, note 35 above.
[290] De Monticelli, note 10 above, p. 144; Andrea Tagliapietra, *Esperienza. Filosofia e Storia di un'Idea* (2017), pp. 75, 183, and 204–205.
[291] Crowell, note 3 above, p. 261.
[292] See Agamben's quote at the beginning of this article.
[293] See Jennifer Nagel, *Knowledge: A Very Short Introduction* (2014), p. 8: "as soon as we recognize the falsity [of what we thought we knew], we have to retract the claim that it was ever known". As the reference to Nagel's (and other philosophers) account(s) indicates, my considerations here are of a purely philosophical nature. There are, of course, different types of knowledge in cognitive science, each one with its own structure and properties.
[294] John Herman Randall Jr., "Pietro Pompanazzi: Introduction", in Ernst Cassirer, Paul Oscar Kristeller, and John Herman Randall Jr. (eds.), *The Renaissance Philosophy of Man* ([1948] 1956), pp. 257, 264: "knowing is not a personal function at all; it is Truth which knows itself, now in this man, now in another". See also ibid.: for the Averroists like Zabarella, "[k]nowledge is not a fragmentary individual possession; it belongs to all mankind, which forms, as it were, taken as a whole, a single man. Men are essentially communistic in knowing".

source of cognition is intuition, an immediate type of cognition… of which perception is the paradigm".[295] Similarly, it could be observed, as Nagel does, that "[k]knowledge demands some kind of access to a fact on the part of some living subject".[296] Yet even in this case, the (experiential, personal, and ultimately imperfect) act of knowing (or perception-based phenomenon of knowledge-acquisition) would not coincide with its metaphysical (i.e. transcendental and objective) end-result – knowledge itself. The cognising subject is, in other words, merely an ontic container of a metaphysical end-result of a process of ontological abstraction. This is why, commenting on Francis Bacon, Theodor Adorno and Max Horkheimer stated that "[k]nowledge, which is power, knows no obstacles".[297] The confusion over what distinguishes experience from knowledge is, however, understandable as it has to do with, among other things, the legacy of Aristotle's treatment of the subject and subordination of experience to knowledge;[298] the Humanist desire to combine the universal with the particular as well as to explain the orderliness of nature through conceptualism and empiricism;[299] and the role that the word 'experience', as synonymous with 'experiment', played in the foundational event of modern knowledge and processes of world-disposition (*Weltbild*) – the Scientific Revolution.[300]

That knowledge has no limits does not mean, of course, that concepts are flawless. Recent debates over how to efficiently conceptualise law and regulatory dynamics are testament to this. As the sheer volume of recent works that feature the terms 'rethinking', 'revisiting', 're-examining', and the like indicates, no categorisation seems to be capable of obtaining unanimous consensus: all conceptualisations are either too thin or too thick, either too loose or too rigid. Legal theorists are well aware of this. Yet, one could assert, an incremental approach to theorising (i.e. theorising as setting forth constructive conceptual explanations concerned

[295] De Monticelli, note 10 above, p. 83. Emphasis omitted.
[296] Nagel, note 293 above, p. 3. But see Russell, note 78 above, pp. 392, 397–398: in taking issue with "some modern empiricists—in particular, the majority of logical positivists", Russell stresses that "[e]xperience is needed for ostensive definitions, and therefore for all understanding of the meaning of words. But the proposition "Mr. A had a father" is completely intelligible even if I have no idea who Mr. A's father was". Thus, Russell concludes, "[w]hen I infer something not experienced—whether I shall or shall not experience it thereafter—I am never inferring something that I can name, but only the truth of an existence-proposition". For the scope of our discussion, Russell's view is also important because it further confirms the symbiotic relationship between knowledge and truth.
[297] Theodor Adorno and Max Horkheimer, *Dialectic of Enlightenment* ([1947] 2007), p. 4.
[298] *Metaphysics*, 980^{a}–981^{b}; 1026^{b}; $1027^{a}20$ and 1039^{b} 27-30.
[299] Ernst Cassirer, *The Individual and the Cosmos in Renaissance Philosophy*, trans. Mario Domandi ([1927] 2010). But cf. Le Goff, note 222 above, pp. 136ff.
[300] David Wootton, *The Invention of Science. A New History of the Scientific Revolution* ([2015] 2016), pp. 104, 51–54, 312, and 417; Tagliapietra, note 290 above, p. 138.
On the political element of Aristotle's and modern scientists', particularly Francis Bacon's, predilection of knowledge over factical experience, see Tagliapietra, note 290 above, chs 7–8.

not only with *necessary*, but also *contingent* features and relations of law) might solve the problem.[301] It is difficult to see, however, how this approach would be able to avoid mental representations' inevitable exclusionary dynamics. Referring to the current "politics of conceptualisation", Hans Lindahl has recently noted that "[r]epresentation discloses something as *this*, rather than as *that*, which entails that it is not possible to include without excluding when conceptualising a range of phenomena as law".[302] Similarly, in an article which aims at explaining why "[c]onceptual analysis is desirable and necessary in jurisprudence because terms ('law') have senses that mediate between the terms and their referents (law)",[303] Aleandro Zanghellini could not but concede that "[t]here is more to law and the legal world than what conceptual analysis can reveal".[304] The much-discussed notions of sovereignty and authority, two-key concepts in current pluralist discourse, are a good example: as the volume of scholarship indicates, an ultimate and all-encompassing framework of intelligibility cannot be construed.[305] The same may be said with respect to the challenges that legal reasoning and jurisprudential inquiry are currently facing beyond state-based models.[306]

Perhaps the time is ripe to say that legal scholars' analytical struggle is primarily due to the belief that experiences can be known as if they were entities and rapports accessible through systematic inquiry. Or to put it differently, that experience (phenomenologically, its *meaning*) can be accessed only through a form of thought that is both structured and structuring along reason's constructivist properties. This is, perhaps, what Herbert Marcuse meant when he wrote

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[301] Michael Giudice, U*nderstanding the Nature of Law. A Case for Constructive Conceptual Explanation* (2015), pp. 43–66.
[302] Lindahl, note 35 above, p. 6. Cf. Jacques Derrida, "Plato's Pharmacy", in *Dissemination*, trans. B. Johnson ([1972] 1981), p. 128.
[303] Aleandro Zanghellini, "A Conceptual Analysis of Conceptual Analysis", *Canadian Journal of Law and Jurisprudence*, XXX (2017), p. 467, 490.
[304] Ibid., p. 469. See also ibid., p. 475: "…we can't identify what counts as a legal thing unless we begin with an analysis of legal concepts (our 'X's: 'law', 'rights', etc.)… [T]he knowledge gained through conceptual analysis about 'X's also informs us legal Xs". Thus, Zanghellini's overall intention is to "vindicate[e] contemporary analytic philosophers' belief that conceptual analysis provides us with insight into the worlds, not just into words".
[305] Without any of presumption of exhaustiveness, see Stephen D. Krasner, *Sovereignty. Organized Hypocrisy* (1999), pp. 3–42; *id.* "Problematic Sovereignty", in Stephen D. Krasner (ed.), in *Problematic Sovereignty. Contested Rules and Political Possibilities* (2001), pp. 1–23; Hent Kalmo and Quentin Skinner (eds.), *Sovereignty in Fragments. The Past, Present and Future of a Contested Concept* (2011); Jean L. Cohen, *Globalization and Sovereignty. Rethinking Legality, Legitimacy and Constitutionalism* (2012); Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (2013), p. 14; Jorge Emilio Núñez, "About the Impossibility of Absolute State Sovereignty", *International Journal for the Semiotics of Law*, XXVII (2014), p. 645; Sergio Dellavalle, "On Sovereignty, Legitimacy, and Solidarity. Or: How Can a Solidaristic Idea of Legitimate Sovereignty Be Justified?", *Theoretical Inquiries in Law*, XVI (2015), p. 367. More broadly, see Dieter Grimm, *Sovereignty. The Origin and Future of a Political and Legal Concept*, trans. Belinda Cooper ([2009] 2015); Roger Cotterrell and Maksymilian Del Mar (eds.), *Authority in Transnational Legal Theory: Theorizing Across Disciplines* (2016).
[306] See William Twining, *General Jurisprudence. Understanding Law from a Global Perspective* (2009), xviii; Cotterrell, note 286 above, p. xiii.

that "the representation of society in the formation of concepts is tantamount to an academic condiment of *experience*, a restriction of meaning".[307]

But if experiences are, following Susan Blackmore (but some commentators might prefer Gorgias[308]), "ineffable"[309] and cannot be analytically decoded and arranged but only shared (i.e. felt and sensed) because of their "inner historicity",[310] and if normative (including legal) plurality is a situational *fact*,[311] how can we *make sense* of the latter without recurring to reason's structuralism and cognition's objectifying dynamics? And how can this be done in an age, such as ours, of "legal hybrids"?[312] That is, in an age that appears to be characterised by the incessant pluralisation and dispersion of regulatory sources and dynamics at the macro-, meso-, and micro-levels that challenge established normative categories of 'identity' and 'difference' and call for a reconsideration and repositioning of 'the sense of the world'?[313] Or as Cotterrell put it, how can we "navigate normatively in a realm consisting not only of inconsistent regulatory regimes but also of regimes founded on differing, sometimes incompatible principles of authority and legitimacy"?[314] Is it possible, in the midst of incessant and mutually reinforcing "normative disorders",[315] to convey the *existential meaning of identities* without any epistemic aspiration while at the same time avoiding the peril of rendering the act of comparison a "fishing expedition" generating only a "meaningless togetherness",[316] as Sartori calls it? A possible answer is introduced in the next Section.

Factical Coherence without Formal Correctness

[307] Marcuse, note 1 above, p. 213. Emphasis added. Marcuse's thought can, however, serve our purpose only partially given his love of dialectical (i.e. Hegelian) reason and attempt at rediscovering what he believed are the latter's critical potentialities.
[308] Simon Critchley, *Tragedy, the Greeks, and Us* (2019), p. 103.
[309] Susan Blackmore, *Consciousness: A Very Short Introduction* (2017), p. 3.
[310] Hans-Georg Gadamer, *Truth and Method*, trans. Joel Weinsheimer and Donald G. Marshall ([1960] 2013), p. 355. See also ibid., p. 364.
[311] Cf. Cotterrell, note 286 above, p. 76. It is perhaps not a coincidence that, as has been argued by Wootton, note 300 above, pp. 251–309, to the modern quest of order there corresponded the emergence of the 'fact' as a medium to gain knowledge of the world and dispose of it. Cf. Oren Ben-Dor, *Thinking about Law. In Silence with Heidegger* (2007), p. 390.
[312] Kaarlo Tuori, "Transnational Law: On Legal Hybrids and Legal Perspectivism" in Maduro, Tuori, and Sankari, note 75 above, p. 11.
[313] Jean-Luc Nancy, *Le sens du monde* (1993).
[314] Cotterrell, note 286 above, p. 137. See also ibid., p. 99.
[315] Neil Walker, "Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders", *International Journal of Constitutional Law*, VI (2008), p. 373.
[316] Sartori, note 256 above, pp. 23, 114, and 52 respectively.

The argument pursued in this article is that plurality is a matter of factical experience rather than reason and knowledge, and thus, analytical reconstructions. Hence, for jurisprudence to be fully pluralist, it needs to abandon the epistemic search for truth and correctness. Neither reason's metaphysical constructivism nor knowledge (a metaphysical end-result of processes of ontological abstraction) can be of assistance in accommodating plurality's ontological irreducibility. As discussed, reason's and knowledge's transcendental character embraces reality only to overcome it. Rather, appreciating the nature and meaning of identity and the alterity that defines it requires experiencing the facticity of the other *as other* (i.e. what it *phenomenologically means* for the other to actualise herself in her ipseity). As in other fields, factical thinking is the gateway to pluralist thinking within (comparative) legal discourse too.

The above considerations should make it clear that the type of phenomenological thinking advocated here is not the one praised by Husserl (and followers), with its cognitivist focus on the correctness of thinking. Yet, and crucially, it not that of Heidegger, either. Inspired by Benjamin's relational understanding of plurality, the thinking this article calls for does not fall pray to the ontic-ontological (or particulars-universals) dilemma. Nor it tries to extract universal truths from specific instances of being. It is, in other words, a mode of thinking that *does not infer* the ontological from the ontic. To operationalise this type of thinking will, however, require some time as it challenges the very way Western metaphysics (and thus, thinking more generally) has approached and conceived of reality.

To show this, one could quote Massimo Cacciari's recent analysis of the subject.[317] While discussing Aristotle's treatment of particulars and universals (primary and secondary substances), Cacciari has noted that "the interrogative of what a being [*ente*] is defines metaphysics and with it, the entire West".[318] Now – and this is the crucial point – because (*i*) thinking (*logos*) is first and foremost *légein*, that is, "connections and conjunctions";[319] and (*ii*) as Fine aptly put it, "universals are all dependent on particulars, by being either said of or in them", [320] asking what a being (a table or a friend, to use the same example as before) is, means, in Western thinking, asking the two specific questions we analysed earlier on. As set out, both lines of questioning are inherently philosophical, having philosophy originated as an exercise

[317] I draw from Cacciari because he is a philosopher to whom "it is crucial that difference be taken at face value" and who was awarded the 2000 Hannah Arendt Prize for his work on plurality. See Alessandro Carrera, "Introduction: Massimo Cacciari's Genealogy of Europe" in Massimo Cacciari, (ed.) Alessandro Carrera, *Europe and Empire, on the Political Forms of Globalization*, (2016), pp. 1, 13.
[318] Massimo Cacciari, *Labirinto Filosofico* (2014), p. 19. All translations are mine.
[319] Ibid., p. 37.
[320] Gail Fine, "Relational Entities", in note 74 above, pp. 326, 347.

aimed at solving the ontological chasm which, at the time of Heraclitus and Parmenides, was making it impossible for language to refer to the world. Further, they are inevitably phenomenological and ontological, involving, as they do, an inquiry into the factical experience of the nature and meaning of identity.

Legal discourse too has explored these interrogatives. Two fundamental inquiries in legal theory and philosophy are, first, what renders law truly such, i.e. as opposed to other regulatory entities; and secondly, how can a distinction between the being of law (ontological) from *the* law (ontic) be formulated. Importantly, as is the case with philosophers, legal scholars too seem to have been holding that an encounter with something (ontic) merely offers a glimpse of the thing's ontological substance and thus it does not exhaust it. Andrew Halpin believes, for instance, that "[w]e do not in having an experience of something experience the totality of that thing".[321] A similar argument can be found in Oren-Ben Dor's call for a Heideggerian, ethically-charged[322] understanding of the being of law: "[a]lthough the essence of law is lurking in any ontic manifestation of it, it could not be further than this manifestation".[323] What Ben-Dor emphasises is but an expression of what Louis E. Wolcher calls Western thought's obsession with "unity and truth",[324] that is to say, the ordering drive that informs Western thinking and makes the latter infer universal truths from singular, factical experiences.[325] "The impulse to unify and verify", Wolcher observes, "is especially strong in matters of law and justice, where the task of ascertaining and judging what happened on the basis of some idea of what ought to have happened seems unavoidable".[326] Few would disagree.

From this it follows that Glenn's reflections on binary and non-binary thinking bring within legal discourse the central and pervasive themes around which phenomenological-ontological inquiry has been developing since Husserl. The fact that Glenn places Plato and Aristotle at the centre of his criticism of binary-exclusionary thinking and logic is all the more interesting as it indirectly points at what Marcuse called classical logic's "ontological prejudice"[327] – that is to

[321] Andrew Halpin, *Reasoning with Law* (2001), p. 109.
[322] Any ethically-oriented reading of Heidegger, it is worth pointing out, is, today, simply untenable given his *Schwarze Hefte*—a collection of thirty-four black notebooks that Heidegger wrote between 1931 and 1975 that contain anti-Semitic passages and that have started being published and translated only recently.
[323] Ibid., p. 156.
[324] Louis E. Wolcher, *The Ethics of Justice without Illusions* (2017), p. 3.
[325] Cacciari put this in more philosophical terms when pointing, in the speech he gave when receiving the Hannah Arendt Prize, to "the most tenacious dream of our reason, that is, to reduce every difference to the articulation of the One; to contemplate in the One every distinction; to deduct from the One, 'purely' intuited, the Many". In "Two German Speeches" in Cacciari, note 317 above, pp. 49, 51.
[326] Wolcher, note 324 above, p. 3.
[327] Marcuse, note 1 above, p. 135.

say, the belief that "the structure of the judgement (proposition) refers to a divided reality".[328] Marcuse continues:

> The discourse moves between the experience of Being and non-Being, essence and fact, generation and corruption, potentiality and actuality. The Aristotelian Organon abstracts from this unity of opposites the general forms of propositions and of their (correct or incorrect) connections; still decisive parts of this formal logic remain committed to Aristotelian metaphysics. Prior to this formalization, the experience of the divided world finds its logic in the Platonic dialectic.[329]

Heidegger too assigned to Plato's mathematical vision of nature[330] and Aristotle's scientification and technologisation of experience[331] a key-role in the creation of a profound misunderstanding regarding what makes up reality. Plato and Aristotle did so, Heidegger maintained, by introducing what he called the 'ontological difference' between Being and beings. Since its inception, this difference has influenced the whole development of phenomenology, or analytical method of philosophy conceived as ontology.[332] The term 'Being'[333] is used by Heidegger to name the letting be of beings as they are in nature, i.e. without the metaphysical 'pro-vocation' (*Heraus-fordern*) of the *res cogitans*.[334] As such, it is different from its ontic manifestations or 'beings', such as a chair, a window, a book, etc. In developing his critique against the technologisation[335] of the spirit that, he believed, has been affecting Western thinking since Plato and Aristotle's substitution of (factical) *logos* with (metaphysical) logic,[336] Heidegger also pointed his finger against modern technology which, he thought, should be kept apart from its ancient counterpart. The latter is a genuine mode of revealing what exists, or "bringing-forth in the sense of *poiēsis*",[337] whereas modern

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[328] Ibid.
[329] Ibid. See also Ernst Cassirer, *The Metaphysics of Symbolic Forms*, Vol. I, trans. Ralph Manheim ([1923] 1955), p. 129: in Plato, "the reality of things can be apprehended only in the truth of concept". Hence, in Platonic idealism, "the 'things' of common experience… becomes 'images', whose truth content lies not in what they immediately are but in what they mediately express".
[330] *Ménon*, 81[d].
[331] See note 298 above.
[332] Martin Heidegger, *The Basic Problems of Phenomenology*, trans. Albert Hofstadter ([1975] 1988).
[333] With capital 'B', also referred to as 'Beyng', or 'being' (as opposed to ontic 'beings').
[334] *Alētheia* as unveiledness, unconcealment and "clearing[,] presencing", in Martin Heidegger, *The History of Beyng*, trans. William McNeill and Jeffrey Powell ([1998] 2015), p. 123.
[335] Heidegger, note 7 above, pp. 209–210.
[336] Ibid., pp. 199–200, 218. See also *id*., *Mindfulness*, note 251 above, p. 148.
[337] Martin Heidegger, "The Question Concerning Technology", in *The Question Concerning Technology*, trans. William Lovitt ([1962] 2013), 3–35, p. 14.

technology is an illusory machination (*Machenshaft*) as "representational calculation".[338] Hence machination "does not name a kind of human conduct but a mode of the essential occurrence of being".[339] It is "the sovereignty of making and of the realm of what is made",[340] which leads to the "distorted essence of the beingness of beings".[341] Machination is whatever hinges on reason's metaphysical constructivism and knowledge's working logic, including theoretical inquires: machination is the desire for "calculable explainability, whereby everything draws equally close together to everything else and become completely foreign to itself".[342] The result is a world in which relationality is voided of its content; a world, that is, in which life becomes a "relation of unreletenedness".[343] "Freedom", Heidegger will later specify, "rests in being able to let, not in ordering and dominating".[344] Arguably, Heidegger accounted for this most clearly in his early philosophy of factical life, where he showed that "[t]here are others in the everyday with-world who are… encountered in their meaningfulness".[345]

In light of the foregoing considerations, and as anticipated earlier, the factical form of thinking advocated here departs from the cognitivist focus on the correctness of thinking that characterises Husserlian phenomenology, and embraces Heidegger's factical hermeneutics (or early philosophy). Yet, crucially, it also moves away from Heidegger's phenomenology, and specifically (*i*) his critique of lived experience and culture – whose dynamics, Heidegger hold, are ultimately metaphysical[346]; and the (*ii*) universal/particulars, or Being/being, antithesis. A starting point for doing this would be to reflect on why meaning (the key normative notion in issues of identity and difference) cannot but be *thematic* (pluralist jurisprudents would say contextual). As it was seen, this has already been set out by Crowell, according to whom phenomenological encounters are first and foremost experience-based semantic events, rather than cognitivist elaborations aimed at gaining knowledge of the world.[347] This explains one of

[338] Martin Heidegger, "Positionality" in *Bremen and Freiburg Lectures*. *Insight into that which Is and Basic Principles of Thinking*, trans. Andrew J. Mitchell ([1994] 2012), 21–43, p. 24. See also ibid., p. 32.
[339] Martin Heidegger, *Contributions to Philosophy: Of the Event*, trans. Richard Rojcewicz and Daniela Vallega-Ney ([1989] 2012), p. 99.
[340] Ibid., p. 104. See also *id*., *Mindfulness*, note 251 above, p. 145.
[341] Ibid., p. 101.
[342] Heidegger, note 339 above, p. 104. See also Scott M. Campbell, *The Early Heidegger"s Philosophy of Law. Facticity, Being, and Language* (2012), pp. 44–45.
[343] Ibid., p. 105.
[344] Martin Heidegger, *Country Path Conversation*, trans. Bret W. Davis ([1995] 2016), p. 149.
[345] Campbell, note 342 above, p. 135. See also ibid., p. xiii: "for Heidegger human life cannot be understood without recognizing the connection human beings have to various contexts of meaningful relationships".
[346] Heidegger, *Mindfulness*, note 251 above, pp. 12, 25, 119, 140–141, 147; *id*., note 331 above, p. 132; *id*., note 339 above, p. 101.
[347] Campbell, note 342 above, p. 10.

the quotes that open this article. Crowell's view adapts well to pluralism's facticity and our ability to experience it to the extent that it encourages a reflection on the ways the living subject encounters (i.e. factically experiences) the existential meaning of the other *as other than herself*. Yet Crowell leaves aside Heidegger's factical philosophy which, if combined with Benjamin's argument on plurality's ontological effectiveness, might assist legal scholars in actualising pluralist thinking.

CONCLUSION

If we are, as Glenn asks us to do, to be sensitive to legal plurality and assign it a predominant place in (comparative) legal studies, then we need to embark upon an experiential thinking that prioritises substance over form, or factical coherence over formal correctness. This requires an other-regarding and meaning-revealing act of lived experience (*Erlebnis*) capable of appreciating that regulatory dynamics are relational *encounters*. Neither logical pluralism, nor analogical processes of analysis/argumentation, nor conceptual representations can be of assistance in this enterprise. This is because the coherence sought here is not that offered by rational and cognitivist forms of validation.[348]

This does not mean, however, that irrationalism is the answer. As Heidegger demonstrated (but one could, with due caution, also refer to Franz Kafka), irrationalism only "plays the games of rationalism more dangerously[,] more covertly, and in a manner less vulnerable to interference".[349] It does not mean denying the ordering dynamics of any act of perception.[350] Rather, it means leaving the plane of socio-cultural scientific object construction and moving to one that has no cognitivist (i.e. structuring) purpose. It means, in other words, opting for a "nonmetaphysical, non-trascendental understanding of the human being, one that proceeds directly from life itself".[351] As discussed, in phenomenological terms, this requires moving beyond Husserlian (specifically, its focus on the cognitivist correctness of thinking) and

[348] Weinrib, note 225 above; Amalia Amaya, *The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument* (2015).
[349] Heidegger, note 7 above, p. 199.
[350] De Monticelli, note 10 above, p. 83. See also Crowell, note 3 above, p. 27. Cf. Ernst Cassirer, *An Essay on Man* (1944), pp. 57, 208.
[351] Campbell, note 342 above, p. 77.

Heideggerian (specifically, its universal/particulars, or Being/being, mind-set and consequential antagonism towards lived experience) phenomenology.

If, as Samuel has made clear, legal reasoning as a rational and epistemic activity is not concerned with the real world, with its actual phenomena, but with their analytical reconstructions, then it would not be enough for comparative law's "epistemic commitments" to be re-conceived "reflexively and critically", as Legrand says.[352] Rather, the appreciation of plurality's ontological irreducibility requires a non-epistemic preoccupation, through an act of lived experience, with the facticity of beings *as* phenomena.

[352] Legrand, note 40 above, p. 21.